SUPREME COURT OF THE UNITED S[illegible]

[illegible]

HIPPOLITE [illegible] ET AL., [illegible]

vs.

CHARLES [illegible]
[illegible]

IN ERROR TO THE CIRCUIT COURT OF THE [illegible]
[illegible]

[illegible]

([illegible])

(17,734.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 263.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES E. MAURICE, CHARLES G. CONVERS, AND WILLIAM G. MAURICE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1900.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Hippolite Filhiol *et als.*, plaintiffs, against Charles E. Maurice, Charles G. Convers, and William G. Maurice, defendants, a manifest error hath happened, to the great damage of the said Hippolite Filhiol and others, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

W. P. FEILD,
Clerk of the Circuit Court of the United States of America for the Western Division, Eastern District of Arkansas.

Allowed by—
JNO. A. WILLIAMS.

Service of this writ acknowledged.

JACOB TRIEBER,
U. S. Attorney, Attorney for Defendants.

1 Be it remembered that on the ninth day of October, 1899, came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas Hippolite Filhiol, Francis J. Watts, Harriett L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by their mother and next friend, all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanch F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, all residents of the State of Texas; Lizzie S. Cochran and

Robert R. Sanford, residents of the State of Illinois; Ellen M. Parker, resident of the State of California; George B. Muse and Mary L. Muse, residents of the State of Minnesota; Malvina R. Muse Bowman, resident of the State of Wisconsin; Bessie Muse, resident of the State of Iowa; James Fort Muse, resident of the State of Oregon; Mary E. Behen, resident of the State of Missouri; Alice F. South, resident of Mexico; Victoria A. Horton Bartolomew, Frederick Horton, and Joseph E. J. Muse, residence unknown, by W. S. and F. L. McCain, Esqs., their attorneys, and filed therein on the law side of said court their complaint and exhibits against Charles E. Maurice, Charles G. Convers, and William G. Maurice; which complaint and exhibits *is* in the words and figures following, to wit:

2 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julie M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by Their Mother and Next Friend, All Residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, All Residents of the State of Texas; Lizzie S. Cochran and Robert R. Sanford, Residents of the State of Mississippi; Mary A. Bres, Resident of the State of Illinois; Ellen M. Parker, Resident of the State of California; George B. Muse and Mary L. Muse, Residents of the State of Minnesota; Malvina R. Muse Bowman, Resident of the State of Wisconsin; Bessie Muse, Resident of the State of Iowa; James Fort Muse, Resident of the State of Oregon; Mary E. Behen, Resident of the State of Missouri; Alice F. South, Resident of Mexico, and Victoria A. Horton Bartholomew, Frederick Horton, and Joseph E. J. Muse, Residence Unknown, Plaintiffs, *vs.* CHARLES E. MAURICE, CHARLES G. CONVERS, and William G. Maurice, Defendants.	5153.	In Ejectment.

Complaint at Law.

The plaintiffs state that in the year A. D. 1821 Don Juan Filhiol, who was then a citizen and resident of the State of Louisiana, died

intestate, and the plaintiffs herein are his descendants and his only descendants and heirs, and each and every one of said Fil-
3 *hoil*'s descendants who are dead died intestate—at least so far as the lands hereinafter described are concerned; that said Filhiol was born in the year 1740 and settled in Louisiana in the year 1779, and was appointed, in the year 1783, by the King of Spain a captain in the latter's army and commandant of the militia and assigned to duty at the post of Ouachita, Louisiana, under Don Esteven Miro, the governor general of the provence of Louisiana; that on December 12th, 1787, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land, whereon the governor ordered the land applied for to be surveyed, and thereafter and before the 22nd day of February, 1788, Don Carlos Trudeau, the then surveyor general of the province of Louisiana, made a survey of said land in accordance with the law then existing and made a report thereof, with figurative plan and procès verbal in due form, in and by which land was described as follows, to wit: A tract of land with a front of eighty-four arpens and a depth of forty-two arpens on each side of the stream called "La Source d'eau Chaude," about two leagues distant from its entrance into the Ouachita, having the Hot springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by land belonging to the Crown, said survey, figurative plan, and process verbal having been lost or destroyed and cannot be produced by plaintiff; and on February 22nd, 1788, the said Don Estevan Miro, as governor of said province, did make and deliver to the said Don Juan Filhoil a grant for a certain league of land, a description of which grant and the land granted is hereinafter more fully described.

That said grant of land was made to their said ancestor, Don
4 Juan Filhiol, while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity of commandant of that then important post; that the said Don Estevan Miro, in his capacity as governor general of Louisiana, was by the Spanish colonial laws vested with power to make grants of land and convey by said grants the absolute fee-simples to the land thus granted; that said land so granted by the said Don Estevan Miro, as governor, on the 22 day of February, 1788, to the said Don Juan Filhoil consisted of a certain one square league of land with the hot springs, at the city of Hot Springs, in said county and State aforesaid, as the center of said league, the description, metes, and bounds of which league of land are more fully and accurately measured and described in said survey, figurative plan, and process verbal of the said Don Carlos Trudeau, hereinbefore mentioned; said grant embraced the land in controversy hereinafter described; said grant is in the Spanish language, but when translated into the English language is as follows:

From the land archives.

The governor and intendant of the Province of Louisiana and West Florida and inspector of troops, etc.:

Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession which he has given to Senior Don Juan Filhiol Commandant of the post of Ouachita of a tract of land of one league square situated in the district of Arcansas on the north side of the river Ou-chita, at about two leagues and a half distance from the said River Ou-chita, and understanding that this land is to be measured so as to include the site or locality known by the name of hot waters as is besides expressed by the figurative plan and certificate of the said surveyor Trudeau above named, and recognizing the same in conformity to the order of survey, we approve those surveys using the faculty, which the King has vested in us, and we grant in his Royal name unto the said Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

We give these presents under our own hand, sealed with the seal of our own arms and attested by the undersigned secretary of his Majesty in this government and intendance.

In New Orleans in the 22nd day of February, 1788.

[L. S.] (Signed) ESTEVAN MIRO.

By mandate of His Excellency.

(Signed) ANDES LOPEZ ARMISTO.

Registered.

That after the making and delivering of said grant to the said Don Juan Filhiol by the said Miro, as governor of said province, as aforesaid, to wit, on the 6th day of December, 1788, one Carlos Trudeau, who was then land and particular surveyor of the province of Louisiana, made, executed, and delivered a certificate of measurement of said grant of land to the said Don Juan Filhiol, which certificate of measurement so made and delivered is in the Spanish language, but which, when translated into the English language, is as follows, to wit:

Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th, day of December, in the year 1787, by Don Juan Filhiol, Commandant of the post of Ou-chita, and by order of his excellency Don Estevan Miro, Brigadier of the R. ex. gob., intendant of the province of Louisiana West Florida etc., dated the 22nd. of Feb uary 1788, directing me to give possession to the aforesaid Commandant of a tract of land of one league square, situated in the District of Arkansas to include that spot known by the name of the Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid Commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ou-chita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which

accompanies in conformity with — of the 6th of the present month of December and of the current year 1788:

(Signed) CARLOS TRUDEAU.

That the making and delivering of said certificate by the said Trudeau was a delivery of the judicial possession of said land, and had the force and effect of segregating said tract from the public domain, and with the grant aforesaid vested full and complete title thereto in the said grantee.

6 Said plaintiffs further state that the said Don Juan Filhiol, their said ancestor, did sell and convey by deed the said league of land described herein to his son-in-law, Narcisso Bourgeat, on the *the* 25th day of November, 1803; that said deed from said Don Juan Filhiol to the said Narcisso Bourgeat was passed before Don Vinciente Fernandez Texeir, lieutenant of the regiment of infantry and military and civil commandant of the district and jurisdiction of Ou-chita, which deed was witnessed by Senor Baron d'Bastrope and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all of whom were principal men in Ou-chita at the date thereof; that said deed from said Don Juan Filhiol to the said Narcissi Bourgeat is in the Spanish language, but which when translated in the English language is as follows, to wit:

Be it known to all to whom this act may come, that I Don Juan Filhiol, Captain in the Army, Commandant of the militia of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law and resident of this district, a tract of land with a front of eighty-four arpints, and a depth of forty-two arpints on each side of the stream called "La Source d'eau Chaude" about two leagues distance from its entrance into the Ou-chita, having the hot springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown the same which belongs to me by virtue of a grant obtained from Senor Don Estevan Miro then governor of these provinces, dated the 12th day of December, 1787. I sell the same to the above-named Bourgeat with all its ways of entrance and exits, uses, stated customes and servitude, free from all charge and mortgage, for the price of One thousand two hundred Dollars, good money which he has paid me in cash, for which sum I acknowledge the receipt, and to obviate the actual receipt thereof at this moment, I renounce the exception of numerata pecunia and do formerly authenticate that I receive it; wherefore I abandon and relinquish all title, possession use, dominion of seign-ory I may have had, or held in and to said tract of land, and do grant unto and renounce in favor of, and transfer to this purchaser all of such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and under-

7 stood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against

eviction and to insure the reality and perfection of this sale, I hereby affect and obligate thereto all the property I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular and being present at the passing of this act, I, the above-named Narcisso Bourgeat, accept the same, acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of Ou-chita on the 25th day of the month of November one thousand eight hundred and three.

I, Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet all of whom are residents of this district.

The interlineation Cavet is part of this act and the erasure Bettin is not.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Done within my jurisdiction.
VINCENTE FERNANDEZ TEXEIR.

BARON DE BASTROP.
J'E POMET.

Which deed was immidiately thereafter duly reported in the proper office of the province of Louisiana, in accordance with the law then existing, and was afterwards duly recorded in said office.

Copies of said deed and the deed of retrocession from said Bourgeat to said Filhiol, hereinafter mentioned, in the original Spanish and French languages, properly certified by the officers in charge of them, attached thereto and endorsed thereon, are herewith filed, marked respectively Exhibits X and Z, the originals being still kept on file as required by law.

That the said Narcisso Bourgeat retroceded the same lands sold to him, as aforesaid, by the said Don Juan Filhiol to the said Don Juan Filhiol by a deed passed before J. Poydras, judge of the court of the parish of Pointe Coupee, July 17th, 1806; that their said ancestors, Don Juan Filhiol, never thereafter parted with
8 his title to said land.

That the said deed from the said Narcisso Bourgeat to the said Don Juan Filhiol was filed for record and recorded in the office of the recorder of the parish of Pointe Coupee, in the State of Louisiana, on the 17th of July, 1806, and that said deed together with a certificate of recordation are as follows, said deed being in the French language, but here translated into the English language, to wit:

I, the undersigned, Narcisso Bourgeat, retroceed by these presents to Monsieur Juan Filhiol, a piece of land three leagues front and

one in depth, situated on the Bayou Darquelon, and one also of a league square, situate at the source of the hot water of the Ou-chita, the which lands he sold to me by deed given before Don Vincente Fernandez Texeir, commandant at that time at said Ou-chita, and which I return to him for the same price and sum which he had parted with to me and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it, appertaining as his right, in behalf of which I have signed at Pointe Coupee the seventeenth day of July, one thousand eight hundred and six.

(Signed) NARCISSO BOURGEAT.

I certify that the presented retrocession has been made in my presence the same day as that above.

(Signed) J. POYDRAS,

Judge of the Court of Pointe Coupee.

The plaintiffs further state that at the time said Filhiol executed said deed to the land in question to said Bourgeat he, in accordance with the requir-ments of the Spanish law, actually produced
9 before Vincente Fernandez Texeir and then and there actually delivered to said Bourgeat all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., the same having been found to be valid, and when said retrocession was made all the title papers were produced before the officer by whom the deed was witnessed, and were actually delivered to the said Filhiol.

Plaintiffs further state that their said ancestor, the said Don Juan Filhiol, in the year 1819 leased the said hot springs to one Dr. Stephen P. Wilson for five years, and that shortly after making the said lease to the said Wilson, to wit, in the year 1821, the said Filhiol died, as aforesaid, and since the death of their said ancestor plaintiffs have always urged their title to said property and employed agents and attorneys to do so for them, but that during a large part of this interval they have been embarras-ed by the want of the said original grant for said land, the same having, without the knowledge of the said heirs of said Filhiol, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants and after whose death, in 1843, the grant was mislaid; that often and repeated searches were made by the said plaintiffs for said grant, but that they failed to find it; that lately, to wit, *that* on or about the — day of ——, 1883, said original grant from said Don Estevan Miro, the Spanish governor general of the province of Louisiana, to the said Don Filhiol was found by Mrs. Matilda E. Moore, of Orleans parish, Louisiana, among the effects of her mother, who was the widow of the said Resin P. Bowie, and that said grant was delivered by said Matilda E. Moore to
10 Margaret A. Muse, who was a daughter of Narcisso Bourgeat and Marie Barbe Filhiol and a grand-daughter of Don Juan Filhiol, in the year 1883; that printed copies of the affidavits of Matilda E. Moore, Ellen M. Coates, and Margaret Adelaide Muse and Hippolite Filhiol as to the finding and delivery of said original

grant and certificate of measurement or survey of the said Carlos Trudeau, marked 1, 2, 3, and 4, are attached hereto and filed herewith.

That said Don Juan Filhiol at the time of his death was and for more than forty years theretofore he had been a citizen and inhabitant of the Territory of Louisiana, and by virtue of the several grants and instruments of writing hereinbefore set out the said Don Juan Filhiol had become the owner and at the time of his death was the owner and in possession of a league of land, being a tract of about three miles square, embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, and including a parcel of land for which the plaintiffs bring this suit and which, for convenience, is hereinafter designated as the land in controversy, the same being that on which the bath-house "Independent" is situated, on the permanent reservation at Hot Springs, Arkansas, described as follows: Bath-house site No. 8 on the plan formulated and filed in the Interior Department by the superintendent of the Hot Springs reservation on the 12th day of May, 1891 (numbered 1162), commencing thirty (30) feet northerly from station 8 on said plan on the front bath-house line and running thence northerly along said line one hundred (100) feet to a point thirty (30) feet northerly of station nine (9) on said line, thence easterly seventy-five (75) feet, thence southerly one hundred (100) feet, and thence westerly seventy-eight (78) feet to place of beginning.

And for cause of action say that by the fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty and without due process of law and in violation of the fifth amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the second day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession and they now hold possession of the land in controversy wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs.

The land and building in controversy are of the value of fifteen thousand dollars, and the rent thereof, with the buildings thereon, is of the value of two thousand dollars per annum.

Wherefore plaintiffs pray judgment for possession of said land in controversy and for five thousand dollars rent thereof, as damages, and for other relief.

(Signed) W. S. AND F. L. McCAIN,
Att'ys for Complainant.

Filed and writs issued October 9th, 1899.

W. P. FEILD, *Clerk.*

12 EXHIBIT Z.

Retrocession de terre de N'se Bourgeat a Filliole (J'n), 17 Juillet 1806.

Je soussigné Narcisse Bourgeat retrocéde par ce present à Monsieur Jean Filhiol une tene de trois liens de face et une de profondeur situeé sur le bayou darquelon, et une idem d'une lien enquarré situeé a la source d'eau chandeau ouchita, lesquelles terres il m'a vendu par acte, passé par devant Don Vincent Fernandes, texeirs commandant pour lois an dit Ouchita, et que je lui revends pour le mème prix et somme qu'il me lés avait laissé, et qu'il m'a remboursé et pourquoi, je le tiens quitte pour qu'il en jouefle comme d'un lien à lui appartenant enfoi de quoi j'ai signé à la Coupee, le dixsept Juillet, mille huit cents six.

(Signed) NARCISSE BOURGEAT.

Je certifie que la presente rétrocession a eté faite en ma prèsence le mème jour et an que dessu.

(Signed) J. POYDRAS,
Juge du Comte de la Pte. Coupée.

13 STATE OF LOUISIANA,
Parish of Pointe Coupée.

I, A. L. Jewell, d'y clerk of court and d'y recorder of conveyances, mortgages, and other acts in and for the parish and State aforesaid, do certify that the foregoing is a true and correct copy of the original act of retrocession of land on file and of record in my office.

Witness my official signature and the seal of office this 28th day of June, 1899.

A. L. JEWELL,
D'y Clerk of Court.

[SEAL.]
[Stamp.]

14 R. A. Young, clerk of the fifth district court, Monroe, La.

MONROE, LA., *July 27th*, 1899.

S. L. Crissy, Esq., 1426 Mass. Ave., Washington, D. C.

DEAR SIR: I enclose certified copy of deed from John Filhiol to Narcisse Bourgeat, and have to state that the reason why the deed was not placed of record until 1833, there was no one in charge of the records who could read and write French and Spanish; as I concluded from an original petition to the police jury posted in front pages of Conveyance Book "Z" of this office setting forth the fact that about three hundred deeds remained in recorder's office unrecorded, dating from 1787 to 1805, from which latter date appears to be the first recording of titles, &c., and concludes with a prayer asking that the police jury make an appropriation to purchase a record book and employ a French and Spanish scholar to record the deeds, as most of them are written in French and Spanish, which was accordingly done in June, 1833, as shown by endorsement on deed.

Yours truly,
R. A. YOUNG.

15 EXHIBIT X.

Vta. de una Legua de tena de Dn. Juan Filhiol a Dn. Narcisso Bourgeat en 25 de Nove. de 1803.

Sepan quantos esta carta vieren como yo Dn. Juan Filhiol capn. de exto y commandante de Milicias de este Puesto qe. otorgo qe. vendo realmente y con efecto à Dn. Narcisso Bourgeat Gratis. mi hierno, y vecino de este distrito una tierra de Ochenta y quatro Arpanes de frente y quarenta y dos de profundidad à cada lada del Rio Llanado de la Source d'eau chaude, distante de su entrada en el del Ouachita como de Dos Lequas teniendo el manantial de Aguas calientes por centro, corriendo sus limités a la profundidad Leste, Oeste, Paralelos, Limitrofe pr. ambos lados contierras realengas, la misma qe. me pertenece pr. aver la obtenido de convecion del Sor. Dn. Estevan Miro Gobernador de estos provincias entouces, en fecha de Doze de Diziembre del año de Mil setecientos Ochenta, y siete y vela vendo al ante dicho con todas sus entradas y salidas usos costumbres dros y servidumbres libre de todo gravamen è hipoteca en el prico de Mil y Dos cientos pesos fuertes qe. me ha pagado de contado de cuya cantidad me doy por entregado a mi voluntad, y por no ser de presente la entrega renuncio la ecepcion de la non numerata pecunia y otorgo for-
16 mal recivo, mediante lo qual me aparto y separo del dio de propiedad posesion util Dominio y Señorio qe. adha tierra tierra avia y tenia, y todo lo cedo renuncio, y traspaso en el comprador y en qu. su causa y dio huviere pr. qe. como propio suyo la posea venda cambie ò enagene à su voluntad pr. esta escritura qe. à su favor otorgo en sènal de Real entrega, conlo qe. ha de ser visto aver adquirido su posesion sinque necesite de otra prueva de que lo relevo, y me obligo ola evicion seguridad y saneamiento de esta venta en toda forma de dio con mis bienes avidos y pr. aver doy aqui pr. incerta la clausa la quarentigia, y renuncio las Leyas de mi favor con la gral enforma y estando presente al otorgamiento de esta escritura Yo el referido Dn. Narcisso Bourgeat la acepto a mi favor reciviendo comprada oha tierra en la cantidad y con formidad qe. me va vendida de ella me doy pr. entregado a mi voluntad, y ottogo formal rcivo; En cuyo testimonio es fecha la carta en el Puesto de Ouachita a los viente y cinco Dias del mes de
17 Noviembre del año de Mil ochocientos y tres. Yo Dn. Vizte. Fern^{3}. Texeiro Tente. del regimto. Infanteria de la Lousiana y comandte. Militar y Politico de este Puesto y su Jurisdicion certificio conouzeo a los otorgantes qe. firmaron siendo testigos de asistencia el Sor. Baron de Bastrop y Dn. Josef Pomet en presencia de Dn. Alexandro Breard, Dn. Carlos Bettin, y Dn. Franco. Cavet todos de este vecindario-entre reriglones-Cavet-vale-Bettin-rayado-no vale.

NARCISSE BOURGEAT.

JUAN FILHIOL.
Ante mi comandante.

VIZTE. FERN^{3}. TEXEIRO.

BARON DE BASTROP.
JN. POMET.

Endorsement.

John Filhiol
t-
Narcisse Bourgeat. } No. 117. 1803. Oud.

STATE OF LOUISIANA,
Parish of Ouachita.

I, Louis F. Lang, parish judge in & for said parish and State, do hereby certify the within to be duly recorded in my office in Record Book L, folio 170.

Given under my hand and seal of office on this 24th day of June, A. D. 1833.

LEWIS F. LANG,
Parish Judge.

18 STATE OF LOUISIANA,
Parish of Ouachita.

I hereby certify that the above and foregoing is a true and complete copy of the original deed, with endorsement thereon, now on file in my office and of record in Notarial Book Z, page 170, of the records of my office.

Witness my signature and seal of office this 27th day of July, A. D. 1899.

R. A. YOUNG,
[SEAL.] *Clerk Fifth Dist. Court and ex Officio Recorder.*
(Stamp.)

19 EXHIBIT No. 1.

STATE OF LOUISIANA,
Parish of Orleans.

Mrs. Matilda E. Moore, widow of Joseph H. Moore, of the above parish and State, being duly sworn, deposes and says that she was born at Opelousas, Louisiana, August 15th, 1817, and is a daughter of Resin P. Bowie, deceased, who was a land agent versed in the practice and prosecution of Spanish and French land claims. Deponent further declares that she heard her father and James Fort Muse, husband of Mrs. Margaret A. Muse, one of the heirs of Don Juan Filhiol, speak together about the claim the heirs of said Filhiol have to Hot Springs, in Arkansas; that she knows the said heirs for many years claimed and attempted to establish their right to said property. Deponent further declair-s that her father, said Resin P. Bowie, died about the year 1841, and that he left a large number of papers relating to said land claims; that after his death parties applied to her mother and herself for documents relative to the Hot Springs claim of the Filhiol heirs; that search was made among her father's papers for them, but without success; that the greater part of her father's papers relating to land claims were taken possession of and carried off by one John Wilson, who had been interested with her father in the prosecution of said land claims, and

she was under the impression the Hot Springs papers were among those carried off by Wilson. Deponent further declares that her mother, widow of said Resin P. Bowie, died about August 25th, 1875; that after her death, while looking over her effects, deponent found in an old trunk, containing relics and papers which had belonged to her mother, *she found* a package of papers rolled up
20 in an old newspaper, marked "papers belonging to Mrs. Bowie," which on examining she exclaimed, "Why, here are Mrs. Muse's Hot Springs papers!" Deponent declares said package contained the original grant to said Don Juan Filhiol by Estevan Miro, a certificate of survey signed Carlos Trudeau, and a pen-and-ink sketch or plat of survey and other papers. Deponent further declares that she gave said package of papers to Mrs. Margaret A. Muse, widow of the aforesaid James Fort Muse, some time during the year 1883. Deponent further decla-es that the pen-and-ink sketch or plat of survey, which accompanied the papers delivered by her to Mrs. Muse, was similar in appearance to the plats or plans of surveys of French and Spanish grants, and was executed on paper similar in appearance to the paper upon which are written the grant by Miro and the certificat- of survey of Trudeau and signed by Carlos Trudeau.

MATILDA E. MOORE.

Sworn to and subscribed before me this 20th day of September, 1889, A. D.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 1½.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Matilda E. Moore, a resident of the above parish and State, being duly sworn, deposes and says she has sufficient knowledge of the Spanish language to know the purport of a grant written in that language, and that she is familiar with the form and appearance of land grants made by the French and Spanish gov-
21 ernments, having seen a number of them in the possession of her father while he was engaged in attending to land claims.

MATILDA E. MOORE.

Sworn to and subscribed before me this 5th day of October, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. "2."

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Ellen M. Coates, widow, a resident of the city of New Orleans, being duly sworn, deposes and says she is a daughter of

James Fort Muse and Margaret A. Bourgeat and a great-granddaughter of Don Juan Filhiol, who was commandant of the post of Ouchita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, made a grant in 1788 of a league square of land in the district of Arkansas, so as to include the hot springs. Deponent further declares that Don Juan Filhiol and his heirs, after his death in 1821, always claimed said land as theirs under the aforesaid grant; that for more than fifty years the heirs have made continual efforts to obtain possession of said property and to establish their rights, employing skilled agents and attorneys for that porpose—among other agents, one Resin P. Bowie, who died about the year 1841. Deponent further declares that the original grant papers for the aforesaid property were mislaid or suppressed until the year 1883, when one Mrs. Matilda E.
22 Moore, widow, resident of the city of New Orleans, and a daughter of the aforesaid Resin P. Bowie, delivered to deponent's mother, Mrs. Margaret A. Muse, the said grant papers, saying she had found them in an old trunk in which her mother, widow of the said Bowie, had kept her private and family relics. Deponent further declares that the *the* claim of the said Filhiol heirs is based on a complete grant; that up to the year 1870 the claimants for land in Arkansas under complete grants had no way of proceeding against the United States, either in court or before the Land Department, as allowed in other States by divers acts of Congress; that by act of Congress approved June 11, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," but ninety days were allowed claimants in which to file suits in the Court of Claims, while in other States years were allowed; that during the time allowed by the aforesaid act one Thomas S. Drew, of Arkansas, was the agent of the heirs of Filhiol; that he obtained many documents and papers relating to their claim from them, but he failed either to file suit in the Court of Claims or to bring their claim to the notice of Congress; that without notice to the heirs he summarily abandoned their case, and they have neve- been able to recover the papers placed in his hands, he having left Arkansas; that after his defection and after the expiration of the time allowed by the aforesaid act, in October, 1873, the claim was placed in the hands of Judge W. J. Q. Baker, of Monroe, who after taking a large amount of testimony and attempting to obtain legislative action by Congress, which he asserted was prevented by the opposition of the suitors for the same property, then in the Court of Claims, and the expiration of the session of Congress, either abandoned the case or died while prosecuting it.

23 Deponent further declares that since the recovery of the original grant papers in 1883, the want of which has always been asserted to be the stumbling-block in establishing the claim, she has been acting for her mother, whose great age has prevented her taking any active part in attending to this claim, and has made every effort to procure the necessary legal assistance to prosecute it; that she has submitted the papers to several lawyers for examination, with the view of placing the claim in their hands for prosecu-

tion, but, on account of her moderate means, without success until the present year; that the numerous heirs of Don Juan Filhiol are scattered in Louisiana, Mississippi, Texas, and Mexico; that the necessity of unity of action on their part, the great distance separating them, and the difficulty in communicating with them, together with the lack of means to obtain legal assistance, has caused the apparent delay in the application for relief, and it was only in the present year that her present attorney informed her that the Congress of the United States would grant the heirs, upon a proper showing, the same facilities allowed to other claimants to prosecute their rights in the courts of the country.

ELLEN M. COATES.

Sworn to and subscribed before me this nineteenth day of September, 1889, A. D.

[SEAL] FRANK HERBERT,
Notary Public.

24 EXHIBIT No. 3.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Margaret Adelaide Muse, widow, of the above parish and State, being duly sworn, deposes and says she was born December 5th, 1803, and is the daughter of Narcisso Bourgeat Mare Barbe Filhiol and a grand-daughter of Don Juan Filhiol, who was a commandant of the post of Ouchita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, on February 22nd, 1788, made a grant of a league square of land in the district of Arkansas so as to include the hot springs; that she married James Fort Muse, a lawyer, February 22nd, 1821, and that he died January 14th, 1843. Deponent further declares that in 1803 her grandfather, Don Juan Filhiol, sold the tract of land granted as above to her father, Narcisso Bourgeat; that in 1806 Narcisso Bourgeat retroceded the same land to Don Jean Filhiol. Deponent further declares that the original grant papers to the aforesaid land were lost to the Filhiol heirs until a few years since, when Mrs. Matilda E. Moore, widow, a resident of the city of New Orleans and a daughter of one Resin P. Bowie, who, about the year 1840, had been employed by the Filhiol heirs to prosecute and establish their title to the above land, delivered to opponent the original Spanish grant of Don Juan Estevan Miro and the certificate of survey of Don Carlos Trudeau, royal surveyor of the province of Louisiana, showing the survey by him of the league square of land granted above so as to include the hot springs, in Arkansas, saying she found them in an old trunk, which had not been opened for years, among other relics of her mother, deceased wife of the aforesaid Resin P. Bowie.

25 Deponent declares that prior to the recovery of the original grant papers aforesaid she and the other heirs had used due diligence in prosecuting their rights under said Spanish grant, and had agents and attorneys employed continuously for that pur-

pose for more than fifty years. Deponent declares the documents handed to her by the aforesaid widow Moore consisted of the original grant, the certificate of Trudeau, royal surveyor, and a pen-and-ink sketch or plat of survey and other papers. Deponent further declares that owing to her great age she is unable to take any active steps in pushing the claim for the aforesaid lands and has put the papers in the hands of her daughter, Mrs. Ellen Muse Coates, of New Orleans, for that purpose.

MARGARET A. MUSE.

Sworn to and subscribed before me this 20th day of September, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 4.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Hippolite Filhiol, of the above parish and State, being duly sworn, deposes and says he is a son of Edmond Landry Grammont Filhiol and a grandson of Juan or Jean Filhiol, who was a Spanish commandant of the post of Ouchita from 1782 to 1800, and to whom was granted by Don Estevan Miro, governor of the province of Louisiana, in 1788, a tract of land one league square, so as to include the hot springs, in the district of Arkansas. Deponent
26 declares that the grant papers to the said land were lost or mislaid for many years; that since the death of Don Juan Filhiol, in 1821, his heirs have made repeated and continued efforts to substantiate their claim to said land, having employed numerous lawyers and agents versed in the land laws and practice to prosecute it, but, owing to the loss of the original grant papers, their said agents have never been able to prosecute their claim to a finality; that these agents, after investigating this claim and obtaining all the supporting evidence in the possession of the heirs, have one after another abandoned its prosecution for the want of the original grant papers from the Spanish government, and that many of the documents placed in the hands of these agents supporting their title the heirs have never been able to recover; that since the expiration of the time allowed by the act of Congress for the institution of proceedings for the hot springs, entitled "An act in relation to the Hot Springs reservation, in Arkansas," approved June 11th, 1870 (U. S. Stats., vol. 16, p. 149), deponent is informed that Mrs. M. A. Muse, one of the heirs of the said Don Juan Filhiol, has recovered the said original grant papers to Don Juan Filhiol which will enable his heirs to substantiate and establish their claim to the said tract of land.

H. FILHIOL.

Sworn to and subscribed before me on this 6th day of September, 1889.

[SEAL.] ROB'T RAY,
U. S. Commissioner.

27 HIPPOLITE FILHIOL ET AL.
vs.
CHARLES E. MAURICE, CHARLES G. CONVERS, and WILLIAM G. Maurice.

Bond for Costs.

I hereby bind myself and undertake to pay to the defendants and to the officers of this court and of any other court to which this cause may be carried all costs which shall accrue or be adjudged to them in this action.

(Signed) S. L. CRISSEY.

Filed October 9th, 1899.

W. P. FEILD, *Clerk.*

28 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 23rd day of October, anno Domini one thousand eight hundred and ninety-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, U. S. district judge, presiding and holding said court, the following proceedings were had, to wit, on November 10th, 1899:

HIPPOLITE FILHIOL ET AL.
vs. 5153.
CHARLES E. MAURICE ET AL.

Come the defendants, by Jacob Trieber, Esq., their attorney, and, by leave of court, file herein their demurrer to complaint; which demurrer is in words and figures following, to wit:

HIPPOLIT- FILHIOL ET AL.
vs. 5153.
CHAS. E. MAURICE ET AL.

Now come the defendants and demur to the complaint herein, and for cause assign—

That the allegations in the complaint do not constitute a cause of action.

(Signed) JACOB TRIEBER,
Attorney for Dfdts.

Filed November 10th, 1899.

W. P. FEILD, *Clerk.*

29 And on November 16th, 1899, the following proceedings were had, to wit:

HIPPOLITE FILHIOL ET AL.
vs.
CHARLES E. MAURICE ET AL. } 5153.

Come the plaintiffs, by W. S. and F. L. McCain, Esqs., their attorneys, and come the defendants, by Jacob Trieber, Esq., their attorney; and the demurrer to the complaint heretofore filed herein being now submitted to the court, and the court being sufficiently advised, doth sustain the demurrer; to which ruling plaintiff excepts; and, the plaintiffs electing to stand on their complaint and declining to amend—

It is considered and adjudged that the complaint be, and the same is hereby, dismissed, and that defendants go hence without day and recover of and from the plaintiffs all their costs herein expended and have execution therefor.

(Signed) JNO. A. WILLIAMS, *Judge.*

30 And on February 12th the following proceedings were had, to wit:

HIPPOLITE FILHIOL ET AL.
vs.
CHAS. E. MAURICE ET AL. } 5153.

Come the plaintiffs, by W. S. and F. L. McCain, Esq., their attorneys, and, by leave of court, file herein their assignment of errors, and also their prayer for writ of error to the Supreme Court of the United States, which is granted.

Which assignment of errors is in words and figures following, to wit:

Supreme Court of the United States, October Term, 1900.

HIPPOLIOT FILHIOL ET AL.
vs.
CHARLES E. MAURICE ET AL. }

And now come Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by their mother and next friend; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, Lizzie S. Cochran, and Robert R. Sanford, Mary A. Bres, Ellen M. Parker, George B. Muse, and Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse and James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, Frederick Horton, and Joseph E. J. Muse, by their counsel, W. S. and F. L. McCain, and respectfully represent that they feel themselves aggrieved by the judgment of the
31 circuit court for the western division of the eastern district of Arkansas and assign error thereto as follows:

1. The court erred in holding that the grant made to Don Juan Filhiol and the figurative plan, process verbal, and survey and certificate of the surveyor general set forth in the complaint of the plaintiffs in error did not vest in the said Filhiol a legal and equitable title to the land in controversy, which was guaranteed and protected by the provisions of the treaty between the United States and France ratified on the twenty-first day of October, 1803.

2. The court erred in holding that the said treaty did not guarantee and protect the said title.

3. The court erred in holding that the deed from Narcisso Bourgeat and said Don Juan Filhiol, executed July 17th, 1806, did not reconvey the legal and equitable title to said Filhiol.

4. The court erred in holding that the said Don Juan Filhiol and the plaintiffs in error, his only heirs-at-law, could be deprived of the title and possession of the said lands by the United States and their agents without due process of law.

5. The court erred in holding that the said Don Juan Filhiol and the plaintiffs in error, his only heirs-at-law, could be deprived of the title and possesion of the said lands by the United States or their agents without making compensation therefor.

6. The court erred in holding that this action was barred by any statute of limitations enacted by the State of Arkansas or the United States.

7. The court erred in holding that this action was barred by the provisions of the act of Congress approved on the 11th day of July, 1870 (16th Stat., 149).

8. The court erred in holding that this action was barred
32 by the laches of the said Don Juan Filhiol or laches of the plaintiffs in error.

9. The court erred in sustaining *of* the complaint of the plaintiffs in error and in dismissing the said complaint.

10. The court erred in not overruling the demurrer and giving judgment to the plaintiffs in error.

Wherefore the said plaintiffs in error pray this honorable court to examine and correct the errors assigned and for the reversal of the judgment of the circuit court of the United States for the western division of the eastern district of Arkansas in the above-entitled cause.

(Signed) W. S. AND F. L. McCAIN,
Attorneys for Plaintiffs in Error.

Filed February 12th, 1900.

W. P. FEILD, *Clerk.*

Which petition for writ of error is in the words and figures following to wit:

33 HIPPOLITE FILHIOL ET AL.
vs.
CHARLES E. MAURICE ET AL.

And now come Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Bene-

dette] H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andrae A. Rowlan, Julia M. Dabbs, Louis St. Clare Horton, and Eugene and Cecil Muse, by their mother and next friend; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, Lizzie S. Cochran, and Robert R. Sanford, Mray A. Bres, Ellen M. Parker, George B. Muse, and Mary L. Muse, Milvina R. Muse Bowman, Bessie Muse, James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, F. Frederick Horton, and Joseph E. J. Horton Muse, and, conceiving themselves aggrieved by the judgment entered herein on the sixteenth day of November, 1899, do hereby pray that writ of error be allowed for the said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

And they present herewith their assignment of errors.

(Signed) W. S. AND F. L. McCAIN,
Attorney-for Plaintiffs in Error.

And now, to wit, on the 12th day of Feb'y, 1900, it is ordered that the writ of error be allowed as prayed for.

(Signed) JNO. A. WILLIAMS,
Circuit Judge.

34 Filed February 12th, 1900.

W. P. FEILD, *Clerk.*

35–38 And on February 24th, 1900, the following proceedings were had, to wit:

HIPPOLITE FILHIOL ET AL.
vs. } 5153.
CHARLES E. MAURICE ET AL.

Come the plaintiffs, by W. S. & F. L. McCain, Esqs., their attorneys, and file herein their appeal bond to the Supreme Court of the United States in the sum of five hundred dollars, which is by the court approved.

Which bond is in words and figures as follows:

39 & 40 And on March 6th, 1900, the following proceedings were had, to wit:

HIPPOLITE FILHIOL ET AL.
vs. } 5153.
CHARLES E. MAURICE ET AL.

Come the plaintiffs, by W. S. and F. L. McCain, Esqs., their attorneys, and file herein their writ of error and citation to the Supreme Court of the United States, which are signed, sealed, and allowed by the court.

Which citation is as follows:

40½ UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in case of Hippolite Filhiol *et al. vs.* Charles E. Maurice *et al.*

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this seventh day of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

Attest: W. P. FEILD, *Clerk.*

Transcript fee, $11.00.

{ Ten-cent U. S. internal-revenue stamp, canceled 3, 7, 1900. }
{ W. P. Feild, clerk. }

41 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 24th day of October, anno Domini one thousand eight hundred and ninety-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 2, 1900:

HIPPOLITE FILHIOL ET AL. }
vs. } 5153.
CHAS. E. MAURICE ET AL. }

Come the plaintiffs, by W. S. and F. L. McCain, Esqs., their attorneys, and file herein their corrected citation to the defendants, which is signed and sealed by the court.

Which citation is in the words and figures following, to wit:

42 The United States of America to Charles E. Maurice, Charles G. Convers, and William G. Maurice, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division, eastern district of Arkansas, wherein Hippolite Filhiol and others are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered

against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Williams, judge of the district court, this 2nd day of April, A. D. 1900.

{The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.}

JNO. A. WILLIAMS,
U. S. District Judge, Eastern District of Arkansas.

Service of this citation is acknowledged April 2, 1900.

JACOB TRIEBER,
U. S. Attorney.

Endorsed: Filed April 2, 1900. W. P. Feild, clerk.

43 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office of the entry, the original corrected citation in case of Hippolite Filhiol *et al. vs.* Chas. E. Maurice *et al.*

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 2nd day of April, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

Attest: W. P. FEILD, *Clerk.*

{Ten-cent U. S. internal-revenue stamp, canceled 4, 2, 1900. W. P. Feild, clerk.}

44 [Endorsed:] File No., 17,734. Supreme Court U. S., October term, 1899. Term No., 620. Hippolite Filhiol *et al. vs.* Chas. E. Maurice *et al.* Certified copy of corrected citation. Office Supreme Court U. S. Filed May 1, 1900. James H. McKenney, clerk.

45 DISTRICT OF COLUMBIA, *ss:*

21ST DAY OF FEBRUARY, A. D. 1900.

James L. Pugh, Jr., surety in the within recognizance, being duly sworn, says that he is worth over and above all his debts and liabilities the sum of five hundred dollars.

(Signed) JAMES L. PUGH, JR.

Subscribed and sworn to before me this 21st day of February, 1900.

[SEAL.] JOSEPH HARPER,
Notary Public in and for the District of Columbia.

46 DISTRICT OF COLUMBIA, ss:

20th DAY OF FEBRUARY, A. D. 1900.

S. L. Crissey, surety in the within recognizance, being duly sworn, says that he is worth, over and above all his debts and liabilities, the sum of five hundred dollars.

(Signed) S. L. CRISSEY.

Subscribed and sworn to before me this 21st day of February, 1900.

[SEAL.] JOSEPH HARPER,
Notary Public in and for the District of Columbia.

47 Know all men by these presents that we, S. L. Crissey and James L. Pugh, Jr., are held and firmly bound unto Charles E. Maurice, Charles G. Convers, and William G. Maurice in the full and just sum of five hundred dollars, to be paid to the said Charles E. Maurice, Charles G. Convers, and William G. Maurice, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-first day of February, in the year of our Lord one thousand nine hundred.

Whereas lately, at the October term, A. D. 1899, of the circuit court of the United States for the western division of the eastern district of Arkansas, in a suit depending in said court between Hippolite Filhiol *et al.*, plaintiffs, and Charles E. Maurice, Charles G. Convers, and William G. Maurice, defendants, a judgment was rendered against the said Hippolite Filhiol *et al.* and the said Hippolite Filhiol *et al.* have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Charles E. Maurice, Charles G. Convers, and William G. Maurice, citing and admonishing them to be and appear in the United States Supreme Court, at the city of Washington, D. C., on the second Monday in October next:

Now, the condition of the above obligation is such that if the said Hippolite Filhiol *et al.* shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

S. L. CRISSEY. [SEAL.]
JAMES L. PUGH, JR. [SEAL.]

Approved by—
JNO. A. WILLIAMS,
U. S. Dist. Judge.

Endorsed: Filed Feb'y 24, 1900. W. P. Feild, clerk.

48 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office of the bond and affidavits on appeal in case of Hippolite Filhiol *et al. vs.* Chas. E. Maurice *et al.*

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 23rd day of April, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

Attest:

W. P. FEILD, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled 4, 23, 1900. W. P. Feild, clerk. }

49 [Endorsed:] File No., 17,734. Supreme Court U. S., October term, 1899. Term No., 620. Hippolite Filhiol *et al.*, P. E., *vs.* Chas. E. Maurice *et al.* Certified copy of corrected bond. Office Supreme Court U. S. Filed May 1, 1900. James H. McKenney, clerk.

50 Supreme Court of the United States, October Term, 1900.

HIPPOLITE FILHIOL ET AL., Plaintiffs in Error,
vs.
CHARLES E. MAURICE ET AL. } No. 263.

It is hereby stipulated and agreed that the bond, at page 36, and citation, on page 40, of the record in the above-entitled case be omitted in printing said record.

JAMES L. PUGH, JR.,
Counsel for Plaintiffs in Error.
J. K. RICHARDS,
Solicitor General, Counsel for Defendants in Error.

51 [Endorsed:] File No., 17,734. Supreme Court U. S., October term, 1900. Term No., 263. Hippolite Filhiol *et al.*, P. E., *vs.* Charles E. Maurice *et al.* Stipulation to omit parts of record in printing. Filed August 22, 1900.

Endorsed on cover: File No., 17,734. E. Arkansas C. C. U. S. Term No., 263. Hippolite Filhiol *et al.*, plaintiffs in error, *vs.* Charles E. Maurice, Charles G. Convers, and William G. Maurice. Filed May 1st, 1900.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 50.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES E. MAURICE ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

STATEMENT OF CASE.

This suit was brought by the plaintiffs, as the heirs and descendants of Don Juan Filhiol, for the possession of a certain tract of land in Garland county, Arkansas, embracing all the hot springs in the city of Hot Springs, in that State.

The source of plaintiffs' title was a grant by Don Estevan Miro, governor of the then Spanish colony of Louisiana, made February 22, 1788. The complaint sets out that on December 12, 1787, Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land of which the governor thereupon ordered a survey to

be made by Don Carlos Trudeau, the then surveyor general of the province, which survey was made in execution of this order prior to February 22, 1788, the date of the grant; that Trudeau made a report of his survey, with a figurative plan and procès verbal thereof, in due form; also one prior to the making of the grant, in which the land was described as follows:

"A tract of land, with a front of eighty-four arpents, and a depth of forty-two arpents, on each side of the stream, called La Source d'Chaude, about two leagues distant from its entrance into the Ouchita, having the hot springs for its center, its limits extending in parallel lines, east and west, to its full depth, and bounded on both sides by land belonging to the Crown."

The complaint further sets up that the survey, figurative plan, and procès verbal had been lost or destroyed and could not be produced by plaintiffs, but that on February 22, 1788, Miro, the governor of the province, made and delivered to Filhiol a grant for a certain league of land, which said grant was in words and figures as follows, to wit:

"*The governor and intendant of the province of Louisiana and West Florida and inspector of troops, etc.:*

"Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land of one league square, situated in the district of Arkansas on the north side of the river Ouchita, at about two leagues and a half distant from the said river Ouchita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of the said Surveyor Trudeau above named, and recognizing the same in conformity to the order of survey, we approve those surveys using the faculty which the king has vested in us, and we grant in his royal name, unto the said Juan Filhiol the said league of land in order that he may dispose of the same, and the usufruct thereof as his own.

"We give these presents under our own hand, sealed with the seal of our own arms, and attested by the undersigned secretary of His Majesty in this government and intendance.

"In New Orleans on the 22d day of February, 1788.

"(Signed) [L. S.] ESTEVAN MIRO.

"By mandate of His Excellency.

"(Signed) ANDES LOPEZ ARMISTO.

"Registered."

Plaintiffs further allege that this grant was made to their ancestor while he was acting as commandant of the post of Ouchita as a reward for his civil and military services in that character; that Miro, in his capacity as governor general, was by the Spanish colonial laws then in force vested with authority to make grants of land, and to convey by said grants the absolute fee-simples to the land thus granted; that after the making and delivery of the said grant by Miro to Filhiol, on December 6, 1788, Carlos Trudeau, the surveyor general of the province executed and delivered a certificate of measurements of the land thus granted to Filhiol; which certificate, translated into English, was in the following terms:

"Don Carlos Trudeau, land and particular surveyor, of the province of Louisiana, in consequence of a memorial signed on the 12th day of December, in the year 1787, by Don Juan Filhiol, commandant of the post of Ouchita, and by order of His Excellency Don Estevan Miro, brigadier of R. ex-gob., intendant of the province of Louisiana, West Florida etc., dated the 22nd of February 1788, directing me to give possession to the aforesaid commandant, of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouchita river, in the district of Arkansas, at about two leagues and a half distant

from said river, to be verified by the figurative plan, which accompanies in conformity with —— of the 6th of the present month of December and of the current year 1788.

"(Signed) CARLOS TRUDEAU."

That the making and delivery of this certificate was a delivery of the judicial possession of the land and had the force and effect of segregating the same from the public domain, and, along with the grant already set out, vested full and complete title thereto in the grantee.

The complaint further shows that Filhiol, on November 25, 1803, by a deed or act of sale passed before Don Vincente Fernandez Texeir, sold and conveyed the land described in the grant of Governor Miro to his son-in-law, Narcisso Bourgeat, which deed was witnessed by the Baron de Bastrop, of Ouchita, and Don Jose Pomet, who signed the act in the presence of Don Alexandre Breard and Don Carlos Bettin, all of whom were principal men in Ouchita at the date thereof; that the said deed, when translated into the English language from the Spanish language, was in the terms following, to wit:

"Be it known, to all to whom this act may come, that I Don Juan Filhiol, captain in the army, commandant of the militia, of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law and resident of this district, a tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'eau Chaude,' about two leagues distance from its entrance into the Ouchita, having the hot spring for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown, the same, which belongs to me by virtue of a grant obtained from Senor Don Estevan Miro, then governor of these provinces, dated the 12th day of December 1777. I sell the same to the above-named Bourgeat with all its ways of entrance and exits, uses stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I

acknowledge the receipt, and to obviate the actual receipt thereof at this moment, I renounce the exception of *numerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession use, dominion of seignory I may have had, or hold in and to the said tract of land, and do grant and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction and to insure the reality and perfection of this sale, I hereby affect and obligate thereto all the property, I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular, and being present at the passing of this act, I, the above-named Narcisso Bourgeat, accept the same acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of Ouchita on the 25th day of the month of November one thousand eight hundred and three.

"I, Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet all of whom are residents of this district.

"The interlineation Cavet is part of this act and the erasure Bettin is not.

"(Signed) JUAN FILHIOL.
"(Signed) NARCISSO BOURGEAT.

"Done within my jurisdiction.
"(Signed) VINCENTE FERNANDEZ TEXEIR.

"BARON DE BASTROP.
"J'E POMET."

The complaint further avers that this deed was immediately thereafter "reported in proper office of the province of Louisiana in accordance with law," and there duly recorded.

It is then alleged that on July 17, 1876, by a deed passed before J. Poydras, the lands were retroceded by Bourgeat to Filhiol, which act of retrocession was recorded in the office of the recorder of the parish of Pointe Coupee, in the State of Louisiana, July 17, 1806; that this act or deed, translated from the French language, in which it was executed, into the English language, was as follows, to wit:

"I, the undersigned, Narcisso Bourgeat, retrocede by these presents to Monsieur Juan Filhiol, a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situated at the source of the hot water of the Ouchita, the which lands he sold to me by deed given before Don Vincente Fernandez Texeir, commandant at that time at said Ouchita, and which I return to him for the same price and sum which he had parted with to me, and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it, appertaining his right, in behalf of which I have signed at Pointe Coupee the seventeenth day of July, one thousand eight hundred and six.

"(Signed) NARCISSO BOURGEAT."

"I certify that the presented retrocession has been made in my presence the same day as that above.

"(Signed) J. POYDRAS,

"*Judge of the Court of Pointe Coupee.*"

Proceeding, the complaint further shows that at the time of the execution by Filhiol of the transfer or conveyance of the land by him to Bourgeat, in accordance with the requirements of the Spanish law, he actually produced before Texeir, lieutenant of infantry and military and civil commander of the district of Ouchita, all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., the same having been found to be valid,

and that all these papers were produced before the officer by whom and in whose presence was passed the subsequent act by which Bourgeat retroceded the property to Filhiol, and were then and there delivered to Filhiol.

The complaint sets out the further statement that Filhiol, plaintiffs' ancestor, in 1819 leased the said Hot Springs to one Dr. Stephen P. Wilson for five years; that shortly after thus leasing to Wilson, to wit, in the year 1821, Filhiol died; that since his death plaintiffs have always urged their title to the property and employed agents and attorneys to do so for them, but they had been during the greater part of this time embarrassed by not having possession of the said original grant, this having been in the hands of one Resin P. Bowie, a distinguish lawyer of the times, but that after his death, in 1843, after much diligent search, the said grant was found among his effects, or those of his widow, in 1883, by Mrs. Mathilda E. Moore, of the parish of Orleans, Louisiana, who was a daughter of the said Narcisso Bourgeat, and by Marie Barbe Filhiol, a granddaughter of Don Juan Filhiol.

The complaint closes with other allegations concerning the cause of action set up, which it is unnecessary to repeat here.

This complaint the defendant met in the lower court with a general demurrer, to the effect that the allegations of the complaint did not constitute a cause of action.

The circuit court having maintained the demurrer and dismissed the complaint, this writ of error was taken out by plaintiffs.

ARGUMENT.

For the reversal of the judgment of the circuit court plaintiffs rely upon certain errors contained in the judgment of the court *a qua*, which are set out in the assignment of errors, on pages 17 and 18 of the record.

The first assignment is as follows:

"The court erred in holding that the grant made to Don Juan Filhiol and the figurative plan, procès verbal, and survey and certificate of the surveyor general set forth in the complaint of the plaintiffs in error, did not vest in the said Filhiol, a legal and equitable title to the land in controversy, which was guaranteed and protected by the provisions of the treaty between the United States and France, ratified on the twenty-first day of October, 1803."

The grant to Don Juan Filhiol was made by Governor Estevan Miro on February 22, 1788. (See Record, page 4.)

Miro, the Spanish governor of Louisiana, had power to grant lands within the province, which at the date of the grant in question included the territory now constituting the State of Arkansas. Such authority of Governor Miro has been affirmed by the supreme court of Louisiana, which has had frequent occasion to consider and adjudicate upon the character and effect of titles granted by the French and Spanish governors of Louisiana.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., page 457 *et seq.*

Choppin *vs.* Michel, 11 Robinson (La.) Rep., 240.

Davis *vs.* Police Jury, 19th La., 541.

Strother *vs.* Lucas, 12 Peters, 437, 438.

It has been held that the courts would take judicial notice without proof of the signatures of the French and Spanish governors and the higher officials of the colony; that if any doubt existed as to the authenticity and genuineness of such

signatures or as to the authority of the officer, the burden of proving fraud or want of authority devolved on the party making the objections.

Choppin *vs.* Michel, 11th Robinson (La.) Rep., 240.
Smythe *vs.* N. O. C. & B. Co., 93 Federal Reporter, 914, 915.
Hays *vs.* Berwick, 2d Martin (La.) Rep. (old series), 138, 139.
Davis *vs.* Police Jury, 19 Louisiana Reports, 541.
Davis *vs.* Police Jury, 1st La. Annual Reports, 294, 295.

The certificate of Andres Lopez Armesto that the grant is "By mandate of His Excellency," following the signature of Governor Miro, must be given its full effect, which would include the verity of his official declaration that the grant was made by the governor, as set out in the instrument which he countersigned.

That there had been a prior survey by Trudeau cannot be disputed, because the grant expressly declares that it was made. It begins with the declaration that the governor "having examined the proceedings (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession of which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land," etc.

However, the inability of plaintiffs to produce the surveyor's plan and procès verbal of Trudeau, made prior to the grant, is compensated by the survey of Trudeau, made December 6, 1788, nearly one year after the grant itself, which was made February 22, 1788. The certificate of Trudeau that he had made such a survey and *delivered possession of the land* to the grantee expressly declares that he did so by order of Governor Miro, upon the petition of Filhiol, presented to him, the governor, December 12, 1787. The declaration of Trudeau is that he measured in favor of

Filhiol the league of land indicated in the latter's memorial, situated "on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distant from the said river," which he declares to be verified by the figurative plan which accompanies it. It will be noted that the description of the land found in Trudeau's certificate agrees with that which appears in Governor Miro's grant, both declaring, among other facts, that it is to be so measured as to include the spot known by the name of "Hot Waters," as expressed in the grant; "Warm Waters," as set forth in the certificate.

The grant of February 22, 1788, sufficiently shows *prima facie* a divestiture of the Spanish king's title to the land which it describes and a vesting of it in Filhiol, the grantee. It is in terms translative of property, since it declares that Governor Miro, "using the faculty" the king had vested in him, in his royal name granted to Filhiol "the said league of land, in order that he may dispose of the same, and the usufruct thereof, as his own." If the description set out in the grant itself may be considered as not fully and completely identifying the land, such defect, if it exists, is supplied by its reference to the figurative plan and certificate of survey, previously made by Trudeau, the surveyor general of the province, which the governor recognizes as "in conformity to the order of survey" made prior to the grant. The governor says in the grant. "We approve those surveys." There is thus called in aid, if such be required, of the description found in the grant itself the exact measurements of the government surveyor, made in his official capacity, in conformity to the governor's order for the making of the same. That such survey was made is established by Miro's approval of it, it being a reasonable presumption that his approval would not have been given to a survey which had never been made; but, on the contrary, that the location, measurements, and plan of Trudeau were before him and were examined before their approval.

The opinion of the circuit court is not found in the record, in consequence of which there is nothing before this court to show the line of reasoning by which the court below reached a conclusion adverse to the plaintiffs. In the absence of any statement of the grounds upon which rested the judgment of the court below, we will assume that the grant was held invalid in the present case, upon the same grounds upon which a similar conclusion was reached by the same court in Muse *vs.* Arlington Hotel Company, 68 Federal Rep., 637, in which case the same grant was under examination.

The Filhiol grant in that case was held imperfect and incomplete by reason of a non-compliance with the twelfth section of the regulations of Alexandro O'Reilley, the first Spanish governor of Louisiana, promulgated February 18, 1770, which was as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the procès verbal, which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant."

The demurrer to the complaint filed in the lower court should have been overruled, since at the most the case disclosed by the complaint could have only failed, if at all, for the want of sufficient proof on the trial of the merits. The complainants have averred every fact which appears on the face of the grant, or which may be reasonably and fairly inferred from what is therein particularly set forth. The grant affirms that there had been an order for a survey prior to its

date; that such survey had been made in conformity with the order, and that it had been approved by the governor. Whether or not these facts are sufficiently established by the recitals of the grant is a question which pertains to the merits of the cause, but not the adequacy of the complaint as stating a cause of action.

The facts that a survey of the land had been made by Trudeau in compliance with the governor's order to that end, both prior and subsequent to the execution of the grant, and that at this survey he made a figurative plan and certificate, to which the approval of the governor had been given, are declared by the grant in positive terms. Upon the demurrer, these facts are not open to dispute or question.

If a prior survey, made pursuant to an order of Miro, was a necessary condition to the validity of the grant, the existence of these conditions were to be ascertained by Miro before the grant was made. The express declaration of the latter that all of the steps had been taken may be accepted as evidence that they had been accomplished.

1st Greenleaf on Evidence, section 20, 144.

The circumstance, therefore, that plaintiffs do not file with their complaint the survey, figurative plan, and procès verbal of Trudeau, which are mentioned in it, in no respect diminishes the strength of case disclosed by the complaint. In any event, there is ample authority for the statement that everything set out in the grant as a fact, if it be necessary for its validity, is fully established by the recital of the grant itself. Besides other facts appearing upon the face of the grant, should be noted the language with which it begins, this declaring that Filhiol was already in possession of the grant ceded, such possession having been given him by Trudeau at a date anterior to the governor's grant. It may be presumed that the possession thus declared in Filhiol was the possession of the distinct, determinate body of land of which the governor designed to convey the king's title; that the

possession given by Trudeau was of a tract of land which had been clearly defined by boundaries and measurements ascertained by himself in the discharge of his official duty.

The recitals and declarations of the grant in this connection, so far as they disclose facts, are original evidence thereof, being within one of the exceptions to the admissibility of hearsay evidence, as to ancient documents.

1st Greenleaf on Evidence, page 141, sections 141, 142, *et seq.*

Conceding, however, for the sake of argument, that we must look solely to the terms of the grant itself for a description of the property, sufficient in terms to identify it, unaided by the sources of information indicated by the references contained in it, and assuming also, for the moment, that its terms of description do not identify the land with sufficient particularity, there is found in the record another muniment of title, which shows that it was located, ascertained, and delimited by competent authority. It appears by the certificate of Trudeau, the surveyor, that he measured the league of land indicated in the memorial, situated " on the north side of the Ouchita, in the district of Arkansas, at about two and one-half leagues distance from said river " (terms corresponding with those used by the grant in describing the land), which measurements are verified by a figurative plan, which accompanied his report or procès verbal of December 6, 1788.

See Record, pages 4 and 5.

The significance and effect of Trudeau's surveys have been well settled by decisions of the supreme court of Louisiana and of the Federal courts. They have been recognized and acted upon in the reports of land commissioners, acts of Congress confirming grants, by the land au-

thorities of the United States, and by the officers of the Department of Interior.

United States *vs.* Hanson, 16 Peters, 200, 201.

United States *vs.* Boisdore, 11 Howard, 91, 92.

Smythe *vs.* New Orleans Canal & Banking Company, 93 Federal Reporter, 919, 920.

Decision of the Secretary of the Interior in New Orleans Canal & Banking Company *vs.* State of Louisiana, rendered January 18, 1884.

Decision of the Commissioner of the Land Office in the "Malines case," 2d Copp's Land Owner, page 21 *et seq.*, especially page 22.

In Litchworth *vs.* Bartels, 4th Martin (La.) Reports, New Series, 136, it was held that a plat or plan certified by Trudeau, surveyor general of the province, was legal evidence in support of title to the land surveyed.

It should be remembered that the survey, the certificate of which is found in the record, was not the one which was made prior to the grant, because it declares that it is made "by order of His Excellency, Don Estevan Miro, brigadier of the R. ex-gob., intendant of the province of Louisiana, West Florida, etc., dated February 22nd, 1788," which is the date of the grant itself. Affirmative evidence is afforded by the terms of this latter, and it was preceded by another survey made by Trudeau at an antecedent date, evidently for the purpose of ascertaining whether the land described in Filhiol's memorial was at the place where the latter declared it to be, and, if so, to locate it and fix the boundaries. The subsequent proceedings of Trudeau, described in his return or certificate of December 6, 1788, were posterior to the grant of Governor Miro.

The procès verbal of Trudeau declares that it is made in consequence of a memorial addressed by Filhiol to Governor Miro, December 12, 1787, and by an order of the latter to him, Trudeau, dated February 22, 1788, to give Fil-

hiol possession of "a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters." The procès verbal further declares that in conformity with the order of the governor he, Trudeau, had measured in favor of Filhiol the league of land indicated in the memorial, situated on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distance from the said river, to be verified by the figurative plan. This description of the land, actually measured by Trudeau, is in coincidence with that which is found in the grant of Governor Miro.

But no departure by Governor Miro from the procedure directed by the 12th section of O'Reilly's regulations could in any manner affect the validity of a grant made by Miro, or diminish its force and effect; the authority of O'Reilly, as governor of the province, did not exceed that of Miro, one of its subsequent governors; the powers of each were of the greatest amplitude; each represented the King of Spain and had full power and authority to do in the province all that the sovereign could do.

United States *vs.* Arredondo, 6th Peters, 728, 729, 746, 747.
Murdock *vs.* Gurley, 5th Robinson (La.), 466.
Davis *vs.* Police Jury, 1st Louisiana Annual, 294.
De Armas *vs.* Mayor, etc., 5th La., 132–198.
Choppin *vs.* Michel, 11th Robinson (La.) Reports, 240.

O'Reilly's regulations were not made even for the guidance of himself, as governor, but prescribed rules of conduct for the subordinate officers of the colony. They could in no respect bind or restrain the power of the governors who succeeded him, they possessing the same power as he, O'Reilly, himself possessed, and hence free to modify, abrogate, or by their personal acts disregard his regulations.

Of these latter it has been said that they were the language of a man who supposed himself to possess full power

over the subject to which the regulations pertained; that the rules prescribed for himself did not purport to be limits imposed by a master, but to be marked out by his own discretion and to be alterable at his will; that he made no allusion to orders emanating from his sovereign, and, marking out the narrow path he was bound to tread, he gave the law himself in the character of a man invested with full powers.

United States *vs.* Clarke, 8 Peters, 455.

Speaking again of the regulations of O'Reilly, it was said in Delassus *vs.* United States, 9 Peters, 135, that—

"It was apparent that these regulations, were intended for the general government of subordinate officers; not to control and limit the power of the person from whose will they emanated.

"The Baron de Carondelet, we must suppose, possessed all the powers, that had been vested in Don O'Reilly; and a concession ordered by him, was as valid as a similar concession directed by Governor O'Reilly, would have been. Had Governor O'Reilly made such a grant, could it have been alleged that he had disabled himself, by his instructions for the regulations of the conduct of his subordinate officers; instructions which the power that created, must have been capable of varying or annulling; from exercising the power created in him by the Crown?"

It is known historically that Governor Miro possessed in the colony of Spain all the power and sovereignty that was vested in the king. It has been said that the sovereign power of a State or kingdom which holds public domain for the benefit of the general community is not restricted by forms as to the manner in which they assign or lay out in part land to an individual, in full dominion of property. While it is true that this is generally done by written titles, emanating from proper authorities, it was not in violation of any principle of natural or equity law or of sound policy to say that when part of the public land is separated from

the rest by metes and bounds and an individual put in possession of it as his own, he acquires title thereto.

Sanchez *vs.* Gonzales, 11 Martin (La.) Reports, Old Series, 211.

Le Blanc *vs.* Viator, 6 Martin (La.) New Series Reports, 256.

The Spanish government recognized verbal as well as written grants.

Landry *vs.* Martin, 15 La. Reports, page 9, citing Strother *vs.* Lucas, 12 Peters, 437.

It was held in 68 Federal Reporter, 640, 641, that the Filhiol grant was imperfect and incomplete, for the reason that the land conceded was not described with sufficient particularity to identify it or fix its location; that, until actual survey was made of it, it was only a floating and unlocated claim which segregated no specific parcel of land from the public domain.

It appears from the terms of the grant itself that Filhiol had already been placed in possession of the tract by Trudeau, surveyor general, which is an indication of the strongest kind that the land granted was definitely known by metes and bounds, sufficiently at least to enable the grantee to take as well as to be placed in possession of the thing granted. It also appears from the grant that the "governor had prior to its execution made an examination of the proceedings had (or acts done)" by Trudeau, the surveyor general, "concerning the possession which he had given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land one league square," etc. Referring evidently to the official governmental survey which was to follow the grant itself, the latter declares "that this land is to be measured so as to include the said locality known by the name of Hot Waters, as is besides stated by the figurative plan and certificate of the said surveyor,

Trudeau." This is a clear statement that a plan and certificate of survey had been made by Trudeau prior to the grant, and that this was before the governor when the grant was made, and it is a fair inference that the "proceedings had or acts done" by Trudeau, which, by the opening words of the grant, were declared to have been examined by the governor, were the surveying operations of which the "figurative plan and certificate" of Trudeau supplied the record. The further declaration of the governor in his grant of his recognition of the "figurative plan and certificate" as being in conformity to the order of survey strengthens the assumption that before the grant was executed there had been an official survey of the land for the purpose of fixing its location and boundaries and identifying it to an extent sufficient to inform the governor of the precise location and extent of the tract conceded by the grant. This would appear conclusive from the following language of the grant, which declared that, using the faculty vested by the king, in the governor, he, in the name of his royal master, granted the league of land unto Filhiol.

It may be said that all of these recitals are simply parts of the grant, which itself is disputed, and that nothing in it can be brought to establish the verity and binding force of the instrument of which they form a part.

In reply it may be stated that whether or not the grant is genuine, if not entirely a question of fact, is one of both law and fact, and predominately of law; the plaintiffs will be entitled to submit to a jury any question of fact concerning the genuineness or validity of the grant in question; this being established, the recitals contained in the instrument would import absolute verity; we have seen that the court will take judicial cognizance of the signatures of colonial governors and higher officials of the Spanish government, in control of the territory of Louisiana, and that any person questioning the same bears the burden of proof to destroy the *prima facie* showing made by the production of an in-

strument purporting to be the official act of the governor or secretary of the State.

It would appear that a description of land no more precise than that contained in the Filhiol grant has been held by this court to be sufficient; a grant of land by the Spanish governor of East Florida, described as "two thousand acres of land, he (the petitioner) solicits," which in the petitioner's *requette* was described as "two thousand acres of land, in the place called Ockla Waha, situated on the margin of the St. John river;" there was in this case no survey of the land until August 20, 1819, some months after the cession of Florida by Spain to the United States, which occurred February 22, 1819.

U. S. *vs.* Perchman, 7 Peters, 82, 83.

Another fact appearing from the record which would show conclusively that the description, location, and boundaries of the tract in question were fully known and understood by Miro, the governor; Armesto, his secretary; Trudeau, surveyor, and Filhiol, the grantee, is disclosed by the conveyance of Filhiol to Bourgeat, before Texier, military and civil commandant of the district, November 25, 1803, and the retrocession of the property by Bourgeat to Filhiol, before the judge of the court of Pointe Coupee, July 17, 1806.

By the regulation of Morales the comptroller and intendant of the province of Louisiana, in whom at the date in question, November 25, 1803, the power to grant lands had been vested by the king by a royal order of October 22, 1798 (U. S. *vs.* Moore, 12 Howard, 218 *et seq.*), notaries public in New Orleans and commandants of posts were forbidden to take any acknowledgments of conveyances of land obtained by cession, unless the seller or grantor presented and submitted to the buyer the title he had obtained, and, in addition, being careful to insert in the deed the metes and bounds and other descriptions "*which resulted from the title*"

and the procès verbal of the survey, which ought to accompany it.

It must be presumed that when Filhiol sold the tract to Bourgeat by a deed passed before Don Vincente Fernandez Texier, military and civil commandant of the district, that the latter proceeded in strict accordance with the above regulation, which appears as article 7 of the instructions of Morales for conceding lands. (See second White's Collection of Laws and Local Ordinances, p. 236.) If Texier followed the instructions enjoined upon him by this article of the regulations of Morales, he required the seller or grantor, Filhiol, to present and deliver to Bourgeat, the buyer, the "title" which he had obtained, and it should be borne in mind that by the word "title" must be considered to mean the legal evidence of the right of Filhiol to the specific tract of land which he was in the act of selling to Bourgeat and which is fully described in his deed to the latter. This appears to have been "a tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'Eau Chaude,' about two leagues distant from its entrance into the Ouchita, *having the Hot Springs for its centre*, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown, the same which to me by virtue of a grant obtained from Senor Don Esteban Miro, the then governor of this province, dated the 12th day of December, 1787." This it is shown to have been recorded in the proper office of the province of Louisiana in accordance with the laws then existing, and was also afterwards recorded in the said office; if Texier, the commandant, the representative of the Spanish government, approving or acknowledging the sale of Filhiol to Bourgeat, representing the king himself, observed the injunctions of article 7 of Morales' regulations, the description of the property sold, found in the deed of sale, was taken from the

title or grant of Filhiol, since by article 7 the metes and bounds and other descriptions of the property conveyed must be those which result from the title and the procès verbal of the survey which ought to accompany it; the effect of this showing would be to establish that the grant of the governor to Filhiol with the official documents which accompanied it or were executed subsequently as a part of it described the land granted with sufficient particularity to enable Texier, acting for the government, to obtain a particular description therefrom which appears in the deed from Filhiol to Bourgeat.

The failure to produce the figurative plan and survey of Trudeau referred to in the grant evidently for the purpose of a more particular description of the boundaries and location of the tract granted is not sufficient for the dismissal of plaintiffs' suit upon a demurrer; if these documents ever existed at all, their non-production upon the trial sufficiently explained, secondary evidence of their contents would be received; surely the declaration of the plaintiffs' cause of action is such that if established by proof on the trial of the merits it would entitle them to a judgment.

The second assignment of error is the following:

"That the court erred in holding, that the said treaty had not guaranteed and protected the said title."

The discussion of this assignment is largely involved in that of the first. If the Filhiol grant was complete under the Spanish government, it segregated from the public domain the land which it covered, and its effect was to make the latter private property. As such it passed from under the Spanish government, when by it the territory was ceded to France, and as such in turn passed to the United States under the treaty of cession. The American Government under the treaty acquired title to public property alone.

Private titles were not divested or in any manner impaired by the several changes of sovereignty.

La Vergne's Heirs *vs.* Elkins' Heirs, 17 La. Rep., p. 220.

Riddle *vs.* Ratlif, 8 La. Annual, p. 106.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., 457; 2 La. Ann. Rep., p. 149; 5th Martin (La.) Rep., p. 653.

Ainsa *vs.* New Mexico, etc., R. R., 175 U. S., p. 81.

By the third article of the treaty concluded between France and the United States April 30, 1803, it was expressly provided that the inhabitants of the ceded territory should be maintained and protected in the full enjoyment of their liberty, property, and the religion they profess.

Treaties and Conventions of the United States, p. 332.

Therefore, if the Filhiol grant was complete before the territory of Louisiana was ceded to the United States, the latter acquired no title to it, and it was beyond the reach or power of Congress or the executive departments.

" That the court erred in holding that this action is barred by the provisions of the act of Congress, approved July 7th, 1870, (16 Statutes at Large)," is the seventh assignment.

The act of 1870 has no reference whatever to the present suit; it authorizes suits against the United States, to be instituted in the Court of Claims, for the recovery of the whole or any part of the four sections of land constituting the Hot Springs reservation.

This suit is not against the United States, although a judgment in favor of plaintiffs would annul the title of the United States; the latter cannot be sued except with its consent; the act of 1870 was designed to permit the government to be sued for the recovery of the whole or any part of the property in question, the suit to be brought, how-

ever, within ninety days from the passage of the act; by section one jurisdiction of such suits was conferred upon the Court of Claims.

Plaintiffs are not seeking any remedy which is created by the act of 1870; the suit is not brought against the United States, nor is it instituted in the Court of Claims; the right to bring a suit like the present one existed prior to, and altogether independent of, the act of 1870; plaintiffs seek to avail themselves of no right or advantage conferred by the act of 1870, and hence are not bound by any of its conditions or limitations.

In United States *vs.* Lee, 106 U. S. Rep., page 196, it was held that the doctrine that the United States cannot be sued except where Congress had provided has no application to officers or agents of the United States, who, when, as such, holding, for public uses, possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may by a court of competent jurisdiction be the subject-matter of inquiry and adjudged accordingly. In the course of the opinion in that case it was said that the claim that such a suit could not be maintained against the individuals in possession of the property, because it was against the Government, was opposed to all the principles upon which the rights of the citizen when brought in collusion with the acts of the Government must be determined; that in such cases there is no safety for the citizen, except in the protection of the judicial tribunals for rights which have been invaded by the officers of the Government professing to act in its name. If such judgments should not be sustained no remedy could be afforded a party, however clear his rights, when it was seen that his opponent was an officer of the United States, claiming to act under its authority (see pages 218, 219); that the defense was based solely upon the immunity from judicial inquiry of every one who asserts authority from the

executive branch of the Government, however clear it may be made that the executive possessed no such power ; that courts of justice were established not only to decide upon the controverted rights of citizens as against each other, but also upon rights in controversy between them and the Government. (See page 220.)

This case contains reviews of prior decisions, extending as far back as United States *vs.* Peters, 5th Cranch, 115. All going to show that suits of a character like the present may be maintained against the Government by bringing into court its officers or agents who have the custody and are in charge of the property sued for.

In Tindal *vs.* Westley, 167 U. S., 204, the rule announced in United States *vs.* Lee was affirmed, the court declaring that " the settled doctrine of this court wholly precludes the idea that a suit against an individual to recover possession of real property is a suit against the State, simply because the defendant holding possession, happens to be an officer of the State, and asserts that he is lawfully in possession on its behalf."

" Whether the one or the other party is entitled in law to possession, is a judicial, and not an executive or legislative question. It does not cease to be a judicial question, because the defendant claims that right of possession is in the government of which he is an officer or agent (167 U. S., 221)."

Lee *vs.* United States holds that defendants in possession of property under the Unittd States when sought to be ousted by suit must show that their possession under and on behalf of the United States is by virtue of some valid authority (114 U. S., 289).

" The fact that the defendant in a suit for possession of land, is an officer of the Navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The Government of the United States is one of law, and its officers cannot deprive any citizen of its property, except as

the law authorizes it, and no law can authorize it except upon just compensation to its owners."

San Francisco Sav. Union *vs.* Irwin, 28 Federal Rep., 708–715.

An officer of the United States in charge of a Government armory can be sued for infringement of a patent, although all his acts in relation thereto have been performed under orders of the Government.

Head *vs.* Porter, 48 Federal Reporter, pp. 481, also 482.

See also Tindal *vs.* Westley, 65 Federal Reporter, pp. 231, also 235.

The mere fact that a defendant in ejectment is sued as controller of a State does not deprive the Federal courts of jurisdiction on the ground that the suit is against the State, while it is averred that the defendant withholds possession wrongfully.

Saranac Land & Timber Company *vs.* Roberts, 68 Fed. Rep., 521.

See also Stanley *vs.* Schwalby, 162 U. S., 255.

Respectfully submitted.

BRANCH K. MILLER,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1901.

HIPPOLITE FILHIOL ET ALS.,
PLAINTIFFS IN ERROR,
v.
CHARLES E. MAURICE ET ALS.

No. 50.

STATEMENT.

This was a proceeding instituted in the Circuit Court of the United States for the Eastern District of Arkansas to recover possession of a lot or parcel of land about seventy by one hundred feet, with the improvements, situated on what is known as the Hot Springs Reservation, in Garland county, Arkansas. The complaint, conforming to the laws and practice of the State, is as follows:

> "Be it remembered that on the 9th day of October, 1899, came into the office of the clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, Hippolite Filhiol, Francis J. Watts, Harriett L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates,

Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by their mother and next friend, all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanch F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, all residents of the State of Texas; Lizzie S. Cochran and Robert R. Sanford, residents of the State of Illinois; Ellen M. Parker, resident of the State of California; George B. Muse and Mary L. Muse, residents of the State of Minnesota; Malvina R. Muse Bowman, resident of the State of Wisconsin; Bessie Muse, resident of the State of Iowa; James Fort Muse, resident of the State of Oregon; Mary E. Behen, resident of the State of Missouri; Alice F. South, resident of Mexico; Victoria A. Horton Bartolomew, Fredrick Horton, and Joseph E. J. Muse, residence unknown, by W. S. and F. L. McCain, Esqs., their attorneys, and filed therein on the law side of said court their complaint and exhibits against Charles E. Maurice, Charles G. Convers, and William G. Maurice, which complaint and exhibits is in the words and figures following, to wit:

[TITLE OF CASE.]

Complaint at Law.

"The plaintiffs state that in the year A. D. 1821, Don Juan Filhiol, who was then a citizen and resident of the State of Louisiana, died intestate, and the plaintiffs herein are his descendants and his only descendants and heirs, and each and every one of said Filhiol's descendants who are dead died intestate—at least so far as the lands hereinafter described are concerned; that said Filhiol was born in the year 1740, and settled in Louisiana in the year 1779, and was appointed in the year 1783 by the King of Spain a captain in the latter's army and commandant of the militia, and assigned to duty at the post of

Ouachita, Louisiana, under Don Estevan Miro, the governor-general of the province of Louisiana; that on December 12, 1787, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land, whereon the governor ordered the land applied for to be surveyed, and thereafter and before the 22d day of February, 1788, Don Carlos Trudeau, the then surveyor-general of the province of Louisiana, made a survey of said land in accordance with the law then existing and made a report thereof, with figurative plan and proces verbal in due form, in and by which land was described as follows, to wit: A tract of land with a front of eighty-four arpens, and a depth of forty-two arpens on each side of the stream, called 'La Source d'Eau Chaude,' about two leagues distance from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the Crown, said survey, figurative plan, and proces verbal having been lost or destroyed, and cannot be produced by plaintiffs; and on February 22, 1788, the said Don Estevan Miro, as governor of said province, did make and deliver to the said Don Juan Filhiol a grant for a certain league of land, a description of which grant and the land granted is hereinafter more fully described.

"That said grant of land was made to their said ancestor, Don Juan Filhiol, while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity of commandant of that then important post; that the said Don Estevan Miro, in his capacity as governor-general of Louisiana, was by the Spanish colonial laws vested with power to make grants of land and convey by said grants the absolute fee simples to the land thus granted; that said land so granted by the said Don Estevan Miro, as governor, on the 22d day of February, 1788, to the said Don Juan Filhiol, consisted of a certain one-square league of land with the

Hot Springs, at the city of Hot Springs, in said county and State aforesaid, as the center of said league, the description, metes and bounds of which league of land are more fully and accurately measured and described in said survey, figurative plan, and proces verbal of the said Don Carlos Trudeau, hereinbefore mentioned; said grant embraced the land in controversy hereinafter described; said grant is in the Spanish language, but when translated into the English language is as follows:

From the Land Archives.

"The Governor and Intendant of the Province of Louisiana and West Florida and Inspector of Troops, etc.

"Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession which he has given to Señor Don Juan Filhiol, commandant of the post of Ouachita, of a tract of land of one league square, situated in the district of Arcansas, on the north side of the river Ou-chita, at about two leagues and a half distance from the said river Ou-chita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of the said surveyor Trudeau above named, and recognizing the same in conformity to the order of survey, we approve those surveys, using the faculty which the King has vested in us, and we grant in his royal name, unto the said Juan Filhiol, the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

"We give these presents under our own hand, sealed with the seal of our own arms, and attested by the undersigned secretary of his Majesty in this government and intendance.

"In New Orleans, in the 22d day of February, 1788.

"[L. s.] (Signed.) ESTEVAN MIRO.

"By mandate of His Excellency:

"(Signed.) ANDES LOPEZ ARMISTO."

Registered.

"That after the making and delivering of said grant to the said Don Juan Filhiol by the said Miro, as governor of said province, as aforesaid, to wit, on the 6th day of December, 1788, one Carlos Trudeau, who was then land and particular surveyor of the province of Louisiana, made, executed, and delivered a certificate of measurement of said grant of land to the said Don Juan Filhiol, which certificate of measurement so made and delivered is in the Spanish language, but which, when translated into the English language, is as follows, to wit:

"Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th day of December, in the year 1787, by Don Juan Filhiol, commandant of the post of Ou-chita, and by order of his excellency, Don Estevan Miro, Brigadier of the R. ex. gob., intendant of the province of Louisiana, West Florida, etc., dated the 22d of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ou-chita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies in conformity with * * * of the 6th of the present month of December and of the current year 1788.

"(Signed) CARLOS TRUDEAU."

"That the making and delivering of said certificate by the said Trudeau was a delivery of the judicial possession of said land, and had the force and effect of segregating said tract from the public domain, and with the grant aforesaid vested full and complete title thereto in the said grantee.

"Said plaintiffs further state that the said Don Juan Filhiol, their said ancestor, did sell and convey by deed the said league of land described herein to his son-in-law, Narcisso Bourgeat, on the 25th day November, 1803; that said deed from said Don Juan Filhiol to the said Narcisso Bourgeat was passed before Don Vinciente Fernandez Texeir, lieutenant of the regiment of infantry and military and civil commandant of the district and jurisdiction of Ouchita, which deed was witnessed by Señor Baron d'Bastrope and Don José Pomet, who signed the act in the presence of Don Alix. Breard and Don Carlos Bettin, all of whom were principal men in Ou-chita at the date thereof; that said deed from said Don Juan Filhiol to the said Narcisso Bourgeat is in the Spanish language, but which, when translated in the English language, is as follows, to wit:

"Be it known to all to whom this act may come, that I, Don Juan Filhiol, captain in the army, commandant of the militia of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law, and resident of this district, a tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'Eau Chaude,' about two leagues distance from its entrance into the Ou-chita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown, the same which belongs to me by virtue of a grant obtained from Señor Don Estevan Miro, then governor of these provinces, dated the 12th day of December, 1787. I sell the same to the above, named Bourgeat with all its ways

of entrance and exits, uses, stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge the receipt, and to obviate the actual receipt thereof at this moment, I renounce the exception of *numerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession, use, dominion of seigniory I may have had, or held in and to said tract of land, and to grant unto and renounce in favor of, and transfer to this purchaser all of said title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing, which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction and to insure the reality and perfection of this sale, I hereby affect and obligate thereto all the property I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular, and being present at the passing of this act, I, the abovenamed Narcisso Bourgeat, accept the same, acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of Ou-chita on the 25th day of the month of November, one thousand eight hundred and three.

"I, Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry of Louisiana, and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Señor Baron de Bastrop and Don José Pomet, who are present assisting, in the

presence of Don Alexander Breard, Don Carlos Bettin, and Don Francisco Cavet, all of whom are residents of this district.

"The interlineation Cavet is part of this act, and the erasure Bettin is not.

"JUAN FILHIOL.
"NARCISSO BOURGEAT.

"Done within my jurisdiction.
VINCENTE FERNANDEZ TEXEIR.
"BARON DE BASTROP.
"J'E POMET.

"Which deed was immediately thereafter duly reported in the proper office of the province of Louisiana, in accordance with the law then existing, and was afterwards duly recorded in said office.

"Copies of said deed and the deed of retrocession from said Bourgeat to said Filhiol, hereinafter mentioned, in the original Spanish and French languages, properly certified by the officers in charge of them, attached thereto and endorsed thereon, are herewith filed, marked, respectively, Exhibits X and Z, the originals being still kept on file as required by law.

"That the said Narcisso Bourgeat retroceded the same lands sold to him, as aforesaid, by the said Don Juan Filhiol to the said Don Juan Filhiol, by a deed passed before J. Poydras, judge of the court of the parish of Pointe Coupee, July 17th, 1806; that their said ancestor, Don Juan Filhiol, never thereafter parted with his title to said land.

"That the said deed from the said Narcisso Bourgeat to the said Don Juan Filhiol was filed for record and recorded, in the office of the recorder of the parish of Pointe Coupee, in the State of Louisana, on the 17th of July, 1806, and that said deed, together with a certificate of recordation, are as follows, said deed being in the French language, but here translated into the English language, to wit:

"I, the undersigned, Narcisso Bourgeat, retrocede,

by these presents, to Monsieur Juan Filhiol, a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situate at the source of the hot water of the Ou-chita, the which lands he sold to me by deed given before Don Vincente Fernandez Texeir, commandant at that time at said Ou-chita, and which I return to him for the same price and sum which he had parted with to me and which he has reimbursed me, and therefore I hold him released, in order that he may enjoy it, appertaining as his right, in behalf of which I have signed at Pointe Coupee the seventeenth day of July, one thousand eight hundred and six.

"(Signed) NARCISSO BOURGEAT.

"I certify that the presented retrocession has been made in my presence the same day as that above.

"(Signed) J. POYDRAS,
"*Judge of the Court of Pointe Coupee.*

"The plaintiffs further state that at the time said Filhiol executed said deed to the land in question to said Bourgeat, he, in accordance with the requirements of the Spanish law, actually produced before Vincente Fernandez Texeir, and then and there actually delivered to said Bourgeat all his title papers, including the certificate of survey, figurative plan, proces verbal, grant, etc., the same having been found to be valid, and when said retrocession was made all the title papers were produced before the officer by whom the deed was witnessed, and were actually delivered to the said Filhiol.

"Plaintiffs further state that their said ancestor, the said Don Juan Filhiol, in the year 1819, leased the said hot springs to one Dr. Stephen P. Wilson, for five years, and that shortly after making the said lease to the said Wilson, to wit, in the year 1821, the said Filhiol died as aforesaid, and since the death of their said ancestor, plaintiffs have always

urged their title to said property and employed agents and attorneys to do so for them, but that during a large part of this interval they have been embarrassed by the want of the said original grant for said land, the same having, without the knowledge of the said heirs of said Filhiol, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and after whose death, in 1843, the grant was mislaid; that often and repeated searches were made by the said plaintiffs for said grant, but that they failed to find it; that lately, to wit, that on or about the — day of ——, 1883, said original grant from said Don Estevan Miro, the Spanish governor-general of the province of Louisiana, to the said Don Filhiol, was found by Mrs. Matilda E. Moore, of Orleans parish, Louisiana, among the effects of her mother, who was the widow of the said Resin P. Bowie, and that said grant was delivered by said Matilda E. Moore to Margaret A. Muse, who was a daughter of Narcisso Bourgeat and Marie Barbe Filhiol, and a granddaughter of Don Juan Filhiol, in the year 1883; that printed copies of the affidavits of Matilda E. Moore, Ellen M. Coates, and Margaret Adelaide Muse, and Hippolite Filhiol, as to the finding and delivery of said original grant and certificate of measurement or survey of the said Carlos Trudeau, marked 1, 2, 3, and 4, are attached hereto and filed herewith.

"That said Don Juan Filhiol at the time of his death was and for more than forty years theretofore he had been a citizen and inhabitant of the Territory of Louisiana, and by virtue of the several grants and instruments of writing hereinbefore set out the said Don Juan Filhiol had become the owner and at the time of his death was the owner and in possession of a league of land, being a tract of about three miles square, embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, and including a parcel of land for which the plaintiffs bring this suit and which, for convenience, is here-

inafter designated as the land in controversy, the same being that on which the bath-house "Independent" is situated, on the permanent reservation at Hot Springs, Arkansas, described as follows: Bath-house site, No. 8, on the plan formulated and filed in the Interior Department by the superintendent of the Hot Springs reservation on the 12th day of May, 1891 (numbered 1162), commencing thirty (30) feet northerly from station 8 on said plan on the front bath-house line and running thence northerly along said line one hundred (100) feet to a point thirty (30) feet northerly of station nine (9) on said line, thence easterly seventy-five (75) feet, thence southerly one hundred (100) feet, and thence westerly seventy-eight (78) feet to place of beginning.

"And for cause of action say that by the fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy, and their full enjoyment of the same, but in violation of the provisions of said treaty and without due process of law and in violation of the fifth amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the second day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession and they now hold possession of the land in controversy wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs.

"The land and building in controversy are of the value of fifteen thousand dollars, and the rent thereof, with the buildings thereon, is of the value of two thousand dollars per annum.

"Wherefore plaintiffs pray judgment for posses-

session of said land in controversy, and for five thousand dollars rent thereof, as damages, and for other relief.

Accompanying the complaint, as exhibits "X" and "Z," are certified copies of the deeds, in the original, from Filhiol to Bourgeat of 1803, in Spanish, and from Bourgeat to Filhiol of 1806, in French.

Rec. 9 *and* 10.

To this complaint the defendant filed a general demurer: "That the allegations in the complaint do not constitute a cause of action."

Rec. 16.

No other pleadings were filed, and the case was heard on the complaint and demurrer. The court sustained the demurrer and ordered the complaint to be dismissed.

The case was brought to this court on writ of error, the plaintiffs filing the following

ASSIGNMENT OF ERRORS.

"1. The court erred in holding that the grant made to Don Juan Filhiol and the figurative plan, proces verbal, and survey and certificate of the surveyor-general set forth in the complaint of the plaintiffs in error did not vest in the said Filhiol a legal and equitable title to the land in controversy, which was guaranteed and protected by the provisions of the treaty between the United States and France ratified on the twenty-first day of October, 1803.

"2. The court erred in holding that the said treaty did not guarantee and protect the said title.

"3. The court erred in holding that the deed from Narcisso Bourgeat and said Don Juan Filhiol, executed July 17th, 1806, did not reconvey the legal and equitable title to said Filhiol.

"4. The court erred in holding that the said Don Juan Filhiol and the plaintiffs in error, his only heirs-at-law, could be deprived of the title and possession of the said lands by the United States and their agents without due process of law.

"5. The court erred in holding that the said Don Juan Filhiol and the plaintiffs in error, his only heirs-at-law, could be deprived of the title and possession of the said lands by the United States or their agents without making compensation therefor.

"6. The court erred in holding that this action was barred by any statute of limitations enacted by the State of Arkansas or the United States.

"7. The court erred in holding that this action was barred by the provisions of the act of Congress approved on the 11th day of July, 1870 (16th Stat. 149).

"8. The court erred in holding that this action was barred by the laches of the said Don Juan Filhiol or laches of the plaintiffs in error.

"9. The court erred in not sustaining *of* the complaint of the plaintiffs in error and in dismissing the said complaint.

"10. The court erred in not overruling the demurrer and giving judgment to the plaintiffs in error.

"Wherefore the said plaintiffs in error pray this honorable court to examine and correct the errors assigned and for the reversal of the judgment of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas in the above-entitled cause."

Rec. 18.

ARGUMENT.

Without repeating these assignments of errors, it will be sufficient for our puposes to consider them all under the tenth:

10. *The court erred in not overruling the demurrer and giving judgment to the plaintiffs in error.*

Jurisdiction.

Has this court jurisdiction to hear and determine this appeal? This question meets us at the outset. The case of Muse, *et als. v.* Arlington Hotel Co. (168 U. S. 430, L. ed. 42, 531), which was decided during the October term of 1897, had the same plaintiffs as the case at bar, and involved a similar question of ownership of land situated in the Hot Springs reservation. In that case the court declined to take jurisdiction, and dismissed the writ of error, stating that the jurisdiction of the Circuit Court, where the suit was begun, was invoked on the ground of diverse citizenship, and not on the ground that the case arose under the Constitution or laws of the United States or treaties made under, or which shall be made under, their authority, as provided in the act of August 13, 1888 (25 Stat. 433). It is then added: "And it is settled that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim." Citing Col. Cent. Consol. Min. Co. *v.* Turck, 150 U. S. 138, L. ed. 37, 1030; Press Publishing Co. *v.* Monroe, 164 U. S. 105, L. ed. 41, 367. The opinion then proceeds: "If this case had been taken to the Circuit Court of Appeals, the decision of that court would have been final under

the 6th section of the statute (Act March 3, 1891, 26 Stat. 826), and it might be well concluded that therefore the writ of error would not lie under the 5th section." And thereupon the court dismissed the writ for want of jurisdiction.

Undoubtedly the act of March 3, 1891, establishing the Circuit Courts of Appeals, clearly provides that cases commenced in the Circuit Courts where Federal jurisdiction rests solely upon diverse citizenship, can only be appealed to the Circuit Court of Appeals, and the decision of this latter court is made final. And when the court found in the Muse case that the Federal jurisdiction was invoked on the sole ground of diverse citizenship, the want of jurisdiction in the Supreme Court was at once apparent.

But the record of the case at bar distinguishes it widely from that case. In the Muse case, the amended complaint on which the issue was joined, stated specifically that "for cause of action" the plaintiffs were "all nonresidents of the State of Arkansas," and were residents of various States, and that one was a resident of the Republic of Mexico. No other allegation was made on which Federal jurisdiction could be based, unless it was that the plaintiffs would rely upon certain "written evidences of their title for the maintenance of the action," naming the various deeds and certificates which had been previously set out in the complaint, and coupling with these, as among the written evidences of title, the 3d article of the treaty between the United States and the French Republic of April 30, 1803, and the fifth amendment to the Constitution. Upon such a complaint we readily concede that, had the case gone to the Circuit Court of Appeals on writ of error, the decision of that court would have been final.

But in the complaint on which the pending case was commenced, our right to be heard in the Circuit Court is not placed on diverse citizenship. The residence of the various plaintiffs is simply given in the title of the case as descriptive matter, and the cause of action is set out as follows:

> "And for cause of action, say that by the fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same; but, in violation of the provisions of said treaty and without due process of law and in violation of the fifth amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the second day of January, 1897, wrongfully and without right oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession and they now hold possession of the land in controversy wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs."

The rule laid down in Ansbro *v.* United States, 159 U.S.695, L. ed. 40, 310, is that a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be reviewed on the ground of error in the disposal of such a claim by its decision.

In the Muse case (168 U. S. 430) it is said: "The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted."

Citing Borgmeyer *v.* Idler, 159 U. S. 408, L. ed. 40, 199.

Under these rules of construction the court says:

"Writs of error may be sued out directly from this court to the circuit courts in cases, among others, in which the construction or application of the Constitution of the United States is involved, or in which the validity or construction of any treaty made under the authority of the United States is drawn in question;" all as provided in the act of March 3, 1891. 26 Stat. 826.

The rule and its application, relating to similar provisions in another statute, are probably more fully and clearly stated in a case of removal of a suit from a State court to a circuit court, under the provisions of the act of March 3, 1875 (18 Stat. 470). This statute enacts that such a removal may be had "in cases where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and arising under the Constitution or laws of the United States, or treaties made*, or which shall be made under their authority," etc. In the case of Southern Pacific R.R. Co. *v.* California, 118 U. S. 109, L. ed. 30, 103, a removal case under this statute, Chief Justice Waite, speaking for the court, says:

"In New Orleans, M. and T. R.R. Co. *v.* Mississippi, 102 U. S. 141, L. ed. 26, 96, that a suit brought by a State in one of its own courts against a corpora-

tion of its own creation can be removed to the Circuit Court of the United States, under the act of March 3, 1875, if it is a suit arising under the Constitution or laws of the United States, although it may involve questions other than those which depend on the Constitution and laws. The case of Ames *v.* Kansas, 111 U. S. 449, L. ed. 28, 482, is to the same effect; and in Starin *v.* New York, 115 U. S. 257, L. ed. 29, 388, it was stated, as the effect of all the authorities on the subject, that if, from the questions involved in a suit, 'it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not.'"

Applying these rules, the Chief Justice announces the following as the unanimous opinion of this court: "*The right of removal does not depend upon the validity of the claim set up under the Constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit.*"

In Metcalf *v.* Watertown, 128 U. S. 586, L. ed. 32, 543, cited in the opinion in the Muse case, *supra*, it is held: "When, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance."

It appeared in this case, as in the Muse case, that the

complaint set up diverse citizenship as the basis of jurisdiction in the circuit court, and did not disclose any other ground on which Federal jurisdiction could be invoked. The other alleged Federal question on which the jurisdiction of this court was subsequently sought was not properly deducible from the pleadings, and only emerged during the trial. The court, however, admits that if the jurisdiction of the circuit court had been invoked in the complaint on two distinct grounds, one of them being independent of diverse citizenship, this court might have taken jurisdiction.

There seems to be no doubt that a case prosecuted in the circuit court upon the ground of diverse citizenship, and upon another, or other, Federal question, which, if standing alone, would have entitled the plaintiff to an appeal, that the allegation of diverse citizenship would not destroy the right to have the case reviewed by this court. This is sufficiently apparent in Metcalf *v.* Watertown, just cited ,and in Borgmeyer *v.* Idler, 159 U. S. 408, L. ed. 40, 199, where the court quotes from Mining Co. *v.* Turck, 150 U. S. 138, L. ed. 37, 1030, as follows: "And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent *entirely* upon the opposite parties being citizens of different States." After this quotation from Mining Co. *v.* Turck, the court, in the Borgmeyer-Idler case, goes on to say: "That from the complaint (in the case it was then considering) it was apparent that the lower court could properly have taken cognizance, on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground."

From these decisions it is apparent that this court has jurisdiction over appeals from the circuit courts wherever

the plaintiff claims some title, right, privilege, or immunity under the Constitution, or under a treaty, and that such claim is put in controversy in the suit; and that the right of appeal does not depend upon the validity of the claim, it being sufficient if it involves a real and substantial dispute or controversy, and such appellate jurisdiction is not affected by the disclosure in the complaint of diverse citizenship.

The complaint in the record now under consideration, clearly declares that the right and title of the plaintiffs in the land in dispute, rest on the protection granted by the fifth amendment of the Constitution and by the third article of the treaty of 1803. It fixes the cause of the action in the fact that the terms of the treaty have not been enforced and its guaranty of protection is being violated, and that the Constitution has been violated by the defendants depriving the plaintiffs of their property without due process of law. No other cause of action is alleged.

To this complaint the defendants put in a general demurrer which the court sustained and directed that the complaint should be dismissed. No opinion was filed. The demurrer put in issue every law question raised by the complaint. While admitting the facts, it denies that we have any right, title, privilege or immunity under the Constitution or the treaty. It denies that we have a grant, or, if we have one, that it is protected under the treaty; declares that the admitted facts fail to show a compliance with the Spanish law which prevailed in the province of Louisiana at the time; denies the authority of the Spanish governor and surveyor to do the things they pretended to do; denies that the defendants have taken plaintiffs' property without due process of law. In a word, every question of law involved in the case is put in issue by the demurrer.

It is not true in this case, as it was said to be in the Muse case, that the decision of the Circuit Court was based on other than Federal questions. The decision, in effect denied, as the demurrer did, that the treaty or the Constitution protected our rights. A decision in favor of a general demurrer must be held to have been adverse to the plaintiffs on every law point involved in his complaint. A general demurrer is denied or sustained as a whole.

The protection of our title under the guaranty of the treaty is certainly in dispute. That we had a perfect title we insist the facts will show. If that contention should prove to be correct, then the words of the treaty clearly make it the duty of the United States to maintain and protect it. "And in the meantime they (the inhabitants of the ceded territory) shall be maintained and protected (by the United States) in the free enjoyment of their liberty, *property*, and the religion which they profess." These are neither idle nor meaningless words. Where a dispute arises as to the property of the former French subjects, the very solemn obligation is at once upon the United States to determine the truth of the matter, and maintain and protect such property rights as they find to exist.

In the language of the court in the Borgmeyer-Idler case, we have set up a right, title, privilege, and immunity under the treaty. We declare that before the treaty was made, while the territory was under the dominion of Spain, our ancestor acquired a perfect title to the tract in question, which right and title has descended, unimpaired to the plaintiffs. The United States subsequently said, by treaty, "If you have such a right we will maintain and protect it."

If it should first be determined by this court that the

admitted facts, disclosed in our complaint, made a perfect title in Filhiol, then could there be any question but what a plea for the protection of the third article of the treaty would raise such a Federal question, under the treaty, as would give this court jurisdiction on appeal? We admit that if Filhiol did not get a perfect title, we have no case. But how is our contention that he *did* have a perfect title to be determined if the court says in advance it has no jurisdiction on the appeal?

Therefore, whether we claim the jurisdiction of this court on the ground that the complaint, *in terms*, sets out that the defendants ousted the plaintiffs from the premises in question in violation of the provisions of the Constitution and the guaranties of the treaty, or whether we put it on the ground that the alleged and admitted facts show a perfect title in our ancestor, and hence, a property right which the United States is bound to protect under the treaty, whether our claim is put on either of these grounds we urge that the court, under its own decisions, should now consider and dispose of the whole case.

If Filhiol had a completed title to the tract, its ownership never passed to the United States. They had no relation to it except as protectors of such title. It never was a part of our public domain, and could never become the property of the United States except by purchase or legal condemnation. They could not lease it, or sell it, or occupy adversely to the owner. It may be true that if the third article of the treaty of 1803 had been omitted, and the obligation to protect the property rights of the former citizens of Spain and France had rested alone on international law, the jurisdiction of this court in such cases as the one at bar, might not be found in the act establishing the circuit court of appeals of March 3, 1891.

That act does not give appellate jurisdiction where the right, title, &c., are claimed under some international obligation unless such obligation is embodied in a treaty. But it does provide that this court may review the decision of a circuit court "where the validity or construction of any treaty" made under the authority of the United States "is drawn in question," and this court has interpreted this to mean a claim of some right, title, privilege or immunity *dependent on the treaty.*

That the construction and application of the treaty are involved here must also be true from the fact that we claim a perfect title under the laws of Spain which prevailed in Louisiana at the time our grant was made. In United States *v.* Turner, 11 How. 663, L. ed. 13, 857, where the title to a tract of land depended upon the application of the Spanish laws, this court said: "The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that State depend, must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other State. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana. * * * If the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the court could not judicially notice, the titles to land in that State would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdict of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend."

A most important point in our contention is that by the Spanish laws and under their provisions we acquired

a perfect title. This is contested by the defendants and raises the very crux of the issue. The treaty declares that if we have such a title the United States will protect it. It is thus under the guarantees of the treaty that we are enabled to get back to the sources of our title and settle this contention. The *right* and *privilege* of showing, or attempting to show, that Filhiol owned the land in question, depend upon the treaty. By reason of the promises of the treaty the grant becomes in effect, and, for the purposes of this suit, the grant of the United States. If we had alleged a grant from the United States, under the laws of the United States, there could be no question but the act of 1891 would give us the right to appeal. In other words, then, if a valid grant is asserted from Spain, the United States, by the treaty, having guaranteed it, became a party to it, and must defend it the same as it would defend a grant of its own. If this be not so the words in Article 3 are vain and meaningless.

The Circuit Court, in sustaining the demurrer, was compelled to consider the grant and its effect under the laws of Spain, the powers of the Spanish governor, the surveyor-general, and other officers, and the authorized regulations concerning the disposal of the Spanish public domain. This, in legal intendment, is equivalent to discussing and passing upon a grant made by the United States. This is a fair deduction from the decision in U. S. *v.* Turner, *supra*.

It thus seems clear to us that the appellants have some "right, title, privilege, or immunity dependent on the treaty," and that the same is so set up and claimed as to require the Circuit Court to pass upon the question, and that it did pass upon it in sustaining the demurrer.

The Grant to Filhiol was Perfect.

Assuming the jurisdiction of the court to examine the case on its merits, we proceed to a discussion of the grant.

It is our contention that the following facts were well pleaded, and are, therefore, admitted by the demurrer:

1. That the plaintiffs are the only heirs of Juan Filhiol, who, at the time of his death, in the year 1821, was a citizen of the State of Louisiana, and that said Filhiol died intestate.

2. That said Filhiol settled in Louisiana in 1779; was appointed by the King of Spain, in 1783, a captain in the Spanish army and commandant of the militia, and was assigned to duty at the post of Ouachita, under Miro, the governor-general of the province.

3. That on December 12, 1787, said Filhiol memorialized the governor-general for a grant of land, and that the governor ordered the land applied for to be surveyed.

4. That before the 22d day of February, 1788, Don Carlos Trudeau, the surveyor-general of the province, made a survey of the land, in accordance with the laws then existing, and made a report thereof, with figurative plan and proces verbal in due form, the land being described as—"A tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream, called 'La Source d'Eau Chaude,' about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the Crown." That said survey, figurative plan, and proces verbal have been lost and cannot be produced.

5. That on the 22d day of February, 1788, the said

governor-general Miro did make and deliver to said Filhiol a form of grant for a certain league of land, which grant was in the Spanish language, a translation of the same being set out in the complaint.

6. That the grant was made to Filhiol while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services; that Miro had the legal power and authority to make such grants conveying the absolute fee simple title to the same.

7. That after said grant was so made and delivered to Filhiol, the said Trudeau, as surveyor-general of said province, made and delivered to him a certificate of survey, a translation of which is found in the complaint.

8. That the making and delivery of said certificate by Trudeau was a delivery of the juridical possession of said land, and had the force and effect of segregating the tract from the public domain, and, with the grant aforesaid, vested full and complete title thereto in the grantee.

9. That Filhiol, on the 25th day of November, 1803, sold and conveyed the land in question to his son-in-law, Narcisso Bourgeat, the deed having been passed before Don Vincente Fernandez Texeir, a lieutenant in the Spanish army, and the military and civil commander of the district and jurisdiction of Ouachita, which deed was witnessed by two parties who signed in the presence of two other parties, all four of whom were principal men in Ouachita at that time. (A translation of this deed is also given in the complaint.)

10. That said Bourgeat in 1806 retroceded the said tract of land to Filhiol by a deed passed before the judge of the court of the parish of Pointe Coupee, and that Filhiol never thereafter parted with the title to the same; that said deeds from Filhiol to Bourgeat and from Bourgeat to Filhiol were duly recorded. (A translation of the

latter deed, which was in French, is also found in the complaint.)

11. That when Filhiol executed the deed to Bourgeat, as aforesaid, he actually produced, in accordance with the Spanish law, before Lieut. Texeir, the civil commandant, and delivered to Bourgeat all his title-papers, including the certificate of survey, figurative plan, *proces verbal*, grant, etc., the same having been found to be valid.

12. That in the year 1819 said Filhiol leased the said Hot Springs, embraced within the tract of land so granted and deeded to him, to one Doctor Stephen Wilson, for a term of five years.

13. That the plaintiffs, since the death of Filhiol, have urged their title to said property, and employed agents and attorneys to do so for them, but that for a long time they were embarrassed by the loss of the original grant, the paper having been put, without their knowledge, into the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants; that said Bowie died in 1843, and in 1883 the original paper-grant was found among his papers by his daughter and restored to plaintiffs.

14. That the lands involved in this controversy are embraced within the tract described in the grant to said Filhiol, and that said lands with the buildings thereon are of the value of $15,000, and the rents are of the value of $2,000 per annum.

We insist that these admitted allegations of the complaint show that at the time of the transfer of the province of Louisiana from France to the United States, on the 20th day of December, 1803, in pursuance of the provisions of the treaty between the two countries, concluded on the 30th day of April, 1803, Narcisso Bourgeat had,

under the Spanish laws, regulations and customs relating to grants and conveyances of land in said province, a complete and perfect title to the square league of land, including the Hot Springs and the tract here in dispute, and that his title passed to Don Juan Filhiol by the deed dated July 17, 1806. Every essential fact necessary to constitute a valid grant of land under the Spanish laws, in force in the province at the time the grant relied on was executed and delivered, is distinctly alleged and admitted, as will be shown by a review of the laws and regulations applicable to the case; and the court must take judicial notice of these laws and regulations, as was decided in United States *v.* Turner, 52 U. S. 663, L. ed. 13, 857.

On the 31st day of July, 1786, the King of Spain appointed and commissioned Don Estevan Miro to be "the political and military governor of the city of New Orleans and the province of Louisiana," conferring upon him all the honors, favors, rights, privileges, and immunities, without exception, attached to that office. (See 2 White's New Compilation, 444.) The regulations then in force were established by Governor O'Rielly, with the royal consent, on the 18th day of February, 1770, and they remained in force, so far as they affected the validity of the grant in this case, until superseded by the regulations of Morales, which were promulgated on the 17th day of July, 1799. The twelfth article of the O'Rielly regulations provided that:

> "All grants shall be made in the name of the King, by the governor-general of the province, who will, at the same time, appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge or notary of the district, and of two adjoining settlers, who shall be present at the survey.

> The above-mentioned four persons shall sign the verbal proces which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, and cabildo, another shall be delivered to the surveyor-general, and the third to the proprietor, to be annexed to the titles of his grant."
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> 2 White's New Recop. 230, 231; 5 Am. State Papers, Lowrie ed. 289, 290.

It will be observed that this regulation contains no provision requiring the grant, or any papers connected with the grant, to be recorded in any public office or elsewhere; such a requirement was made, for the first time, in the regulations promulgated by Morales in 1799, long after the grant to Filhiol. In a previous discussion of this case, the regulations of O'Rielly were confounded with the regulations of Morales and with the laws and regulations of Mexico, in the most bewildering confusion, and parties have attempted to apply, as conclusive of the questions involved, judicial decisions made upon grants issued under laws entirely different from the rules governing this one. Nor do the regulations of O'Rielly require the grantee to be put in actual possession of the land by any formal act, in order to complete his grant, as has been erroneously assumed to be the case. They do not even require the grant to be preceded by a memorial, or *requete*, although that seems to have been the customary mode of making an application, and it was the mode adopted in this instance. But the *requete*, not being required by the laws or regulations, if actually made, constitutes no part of the evidence of title, and need not be pleaded or preserved, or accounted for.

The governors-general of the Spanish provinces possessed very great powers in relation to the disposal of the

crown lands, and it is probable that a too liberal exercise of their authority to make grants as rewards for public services, and upon other considerations, was one reason why it was taken away from them and conferred upon the general intendant by the royal order of October 22, 1798, and the Morales regulations in 1799. See 2 White's Compilation, 238, 245. Their grants of the public lands appear to have been practically final and conclusive in all cases. White, who was appointed by President Adams in 1828, at the instance of Attorney-General Wirt, to make a complete translated collection of all the French and Spanish ordinances affecting land titles in the territories ceded to the United States, says, in his official report to the Secretary of State: "I sought assiduously, but have been unable to discover a record or notice of the proceedings upon some" (any) "grant or concession which has been made by a captain-general, intendant, or governor, and disapproved of by the king. I have been unable to ascertain whether any such exist." It may reasonably be assumed that if his researches failed to discover such a case, it was because none such existed, the king having always acquiesced in and respected the grants made by the captains-general, intendants, and governors of his provinces in the Indies.

In Solorzanos *Politica Indiana*, a work of the highest authority on the laws and customs prevailing in the Indies under the dominion of Spain, the powers of viceroys, captains-general and governors are examined and stated with great care, as will be seen from the following extracts:

> "Because, as Carolo Pascalio says, and Calisto Ramirez, subjects have no obligation to investigate or know the orders and instructions of a secret nature which are given to the viceroys, in which

bounds are put to their power, for, if they do not obey them, they are subject to reprehension or punishment; but what they may perform must be sustained, because they are in quality of factors or substitutes to royalty, for whose actions he who named them is accountable, and put them in that charge which is indeed conformable to right."

Book 3, Chapter 5, Article 31.

"But although this, as I said, proceeds with reference to common law, and it is fit that the viceroys and governors of the Indies never cease to bear it in mind, still, as regards the municipal duty of these, the whole, or almost the whole, is left to their discretion and prudence; because in the conflict or concurrence of these *cedulas* (royal provisions) and orders *de providende*, they have not to attend so much to the dates and orders of these as to that which may appear for them most convenient to execute; as also, what the merits and services of those who have presented them ask and require, and the state of things in their countries and provinces, the government of which is committed to them."

Book 3, Chapter 9, Article 14.

"This calls us to another question not less frequent and difficult, upon which I have seen some suits adjourned from a discord of opinion—I mean who is to have the preference of two, of whom one obtained by favor from the court a special *encomienda* (Indian tribute) by dispensation made to him by His Majesty; and another obtained the same in the Indies by grant of the viceroys or governors, having there power to do it, without having notice of the other from His Majesty.

"I judge we can examine and easily solve this question as respects the right, only by informing ourselves and looking attentively as to the fact of which of these grants of the same objects preceded the other; for, if we suppose the vacancy to happen in

the Indies, and the viceroy or governor, who *there is as the king himself*, made the appointment lawfully and immediately, and in exercise and use of his faculties gave the title and possession thereof to some well-deserving person, we must come to the resolution that the grant of this same encomienda, which afterwards may be found to be made by the king in his court, is of itself null and of no value or effect, because there is no vacancy to supply, as we said in chapter five, on account of its being previously occupied, and the grant made in proper time; and the concession made in the name of the king, in virtue of authority sufficient and his own commission, must be, and must remain always firm and valid as if himself had made it. Of this we have an express text in speaking about what is done by the procurators of Cæsar (1 i. de off. Proc. Cæsar) and others, still more expressive, which decide upon what we are saying upon the subject of gifts."

Book 3, Chapter 10, Article 25.

"And truly, the provinces of the Indies being, as they are, so distant from those of Spain, it became necessary that in these, more than any other, our powerful kings should place these images of their own, who should represent them to the life, and efficaciously, and should maintain in peace and tranquillity the new colonists of their colonies, and should keep them in check, and in proper bounds, by such a dignity and authority as the Romans did when they spread theirs over the best part of the globe, dividing the most remote into two kinds, which they called *consular* and *pretorean*—the emperors themselves taking the government of the principal of these in their own hands, and charging the Senate with the second; and giving to those who went to govern the first the name of proconsuls, and to the others that of presidents—about which we have entire chapters in law, where the commulators speak of this more extensively, and an infinity of authors."

Book 5, Chapter 12, Article 4.

"Article 10. From which it happens that, regularly, in the provinces which are entrusted to them, and in every case, and in all things which are not especially excepted, they possess and exercise the same power, authority, and jurisdiction, with the king who names them."

Book 5, Chapter 12.

"The first established rule and sentence is, that viceroys can act and dispatch in the provinces of their government, in cases which have not been especially excepted, all that the prince who named them might or could do if he were himself present, and for this reason and cause his jurisdiction and power must be held and judged more as a thing established than delegated."

Book 5, Chapter 13, page 376, Article 2.

"Article 4. In particular passages relating to viceroys of the Indies, we have an infinite number of cedulas which decide this and assert the same, which can been seen in the first volume of those in print from page 237, and, besides these another still of a prior date, given at St. Lorenzo, 19th of July, 1614, which orders, generally, 'that the viceroys, as holding the place of the king, can act and decree in the same manner as the royal person, and must be obeyed as one holding his authority, without replying, without interpretation, under the penalties to which are subjected those who do not obey the royal commands, and such laws as may be imposed by them; and that which they ordain and command the king will hold as firm and valid.'"

"Article 5. All which is certain, and in such manner that, even when they exceed their powers or secret instructions, they must be obeyed like the king himself, although they may transgress, and are afterwards punished for it, as I have already said in other chapters; and Mastrillo expresses it at some length in speaking of the practice of these secret in-

structions, and the form which must be observed in them. And the reason of this is, because we must almost (always) presume in favor of the viceroys; and what they do we must consider as done by the king who appointed them, as is said in many texts, and by several authors."

In the case of United States *v.* Arredondo, 31 U. S. 691, L. ed. 8, 547, this court said:

> "The laws of an absolute monarchy are not legislative acts—they are the will and pleasure of the monarch, expressed in various ways; if expressed in any it is a law—there is no other law making, law repealing power—call it whatever name, a royal order, an ordinance, a cedula, a decree of council, *or an act of an authorized officer*, if made or promulgated by the king, by his assent or authority, it becomes as to the person or subject-matter to which it relates, a law of the kingdom. It is emphatically so in Spain and all its domains" (page 718). "A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it" (*Ibid*).

Speaking of the policy of the United States in relation to the recognition of these grants, as declared by the action of Congress, the court said:

> "They have adopted as the basis of all their acts the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested, whether it was property at the time the treaties took effect. The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached" (page 717).

When a grant purports to have emanated under all the official forms and sanctions of the local government, it must be respected; or, as the court said in the case cited: "That is deemed evidence of their having been issued by lawful, proper and legitimate authority, when unimpeached by proof to the contrary" (page 722). "The grant, legally and fully executed, was competent evidence of the matters *set forth in it*, and as none other was necessary it was in effect conclusive" (page 723). And, again, "that every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself" (page 729).

In the same case, and on the precise point now under consideration, the court laid down the following rules or principles, which, so far as we are aware, have been adhered to ever since: "A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implications; an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence, on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury, or chancellor must receive it as evidence *both of the facts it recites and declares, leading to and the foundation of the grant*, and all other facts legally inferable by either, from what is so apparent on its face" (page 728). "If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid, if there is a discretion conferred, its abuse is a matter between the governor and his government" (*Ibid*). The court cited the case of King *v.* Picton, Gov. of Trinidad, 30 St. Tr. 869, and then says: "The only questions

which can rise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, the power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170–1), legislative (4 Wheat. 423; 2 Pet. 412; 4 *Ibid*, 563), or special (20 Johns, 739; 2 Dow. P. C. 521), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law" (page 729). See also Patterson *v.* Jenckes, 28 U. S. 216, L. ed. 7, 402.

In United States *v.* Clarke, 33 U. S. 436, L. ed. 8, 1000, the land was situated in East Florida, and the grant referred to the royal order of October, 1790, issued by the Captain-General of Cuba, but the court held that it was not issued under that order, but was made in consideration of services. Chief Justice Marshall, who delivered the opinion of the court, examined at considerable length the source and nature of the power of the governors of Spanish provinces in the Indies, to make grants of land in remuneration for public services, and their right to do so at their own discretion was distinctly recognized. Among other things he said: "A grant made by a governor, if authorized to grant lands in his province, is *prima facie* evidence that his power is not exceeded. The connection between the crown and the governor justifies the presumption that he acts according to his order. * * * Such a grant under a general power would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled, by superior authority, would be received as evidence" (page

451). "He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him or that the transaction is tainted with fraud" (page 452).

In the same case, the chief justice, speaking of the regulations of O'Rielly, which were not abrogated as to East Florida by the Morales Ordinances of 1799, said: "This is most clearly the language of a man who supposes himself to possess full power over the subject. The rules he prescribes for himself do not purport to be limits imposed by a master, but to be marked out by his own discretion, and to be alterable at will. He makes no allusion to orders emanating from his sovereign, marking out the narrow path he is bound to tread, but gives the law himself, in the character of a man invested with full powers" (page 454).

In the case of Strother *v.* Lucas, 37 U. S. 410, L. ed. 9, 1137, the court discussed the authority of Spanish governors to make grants of land in the provinces, and said: "Where the act is done contrary to the written order of the King, produced at the trial, without explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects" (page 437). This general and comprehensive power belonged, not only to the particular governor who made the regulations, but to his successors as well. In Delassus *v.* United States, 34 U. S. 117, L. ed. 9, 71, it was said: "The regulations of Governor O'Rielly were intended for the general government of subordinate officers, and not to control and limit the power of the person from whose will they emanated. The Baron Carondelet must be supposed to

have had all the powers which had been vested in Don O'Rielly."

See also Smith *v.* United States, 29 U. S. 511, L. ed. 7, 938.

These citations and quotations are made for the purpose of showing:

1. That the Spanish governors in the province of Louisiana were invested with full power and authority to make grants of land within the limits of their jurisdiction, and that, in the execution of this power, they were not absolutely bound by the terms of the regulations made by themselves or their predecessors; and

2. That a public grant of land by one of these officials not only passed the title, if it purported to pass it, and there was a sufficient description of the land to identify it, but, if not impeached for fraud, is evidence of the facts recited in it "leading to and the foundation of the grant."

31 U. S. 728.

Recitals in Deeds Binding.

It is too well settled to require discussion that recitals in a deed or grant are binding on parties and privies. Shelby *v.* Wright, Willes, 9; Crane *v.* Morris, 31 U. S. 598, L. ed. 8, 514; Carver *v.* Jackson, 29 U. S. 1, L. ed. 7, 761; Carsens *v.* Carsens, Willes, 25. While recitals do not generally bind strangers to the deed or grant, or those who claim by title paramount to it, or by title from the same party anterior to the date of the reciting deed or grant, they may be used, even against strangers, as secondary evidence, to prove the contents of a recited paper, which is shown to have existed and to have been lost. 4 Greene (Iowa), 364; Carver *v.* Jackson, 29 U. S. 1, L. ed. 7, 761;

Ford *v.* Gray, 1 Salk. 285. In Glenn *v.* United States, 54 U. S. 250, L. ed. 14, 133, the court held that "the petition and the paper signed by Delassus (commandant) must be taken together" and "whatever is stated in either as to facts or intent must be taken as true." In that case, where the concession was made by Delassus, a commandant, acting as a subdelegate of the governor, and having no authority to make grants except such as his superior had conferred upon him, the court said that, "taking the facts stated in the memorial and in Delassus' decree thereon to be true (as we are compelled to do) it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan in accordance with the governor-general's instructions"; and, notwithstanding the positive limitations imposed upon the officials by the Mexican law and regulations, this court said in Hornsby *v.* United States, 77, U. S. 224, L. ed. 19, 900: "The grant recites that the necessary steps were taken and something more than mere surmises, at this day, are necessary to show that the recital is false."

In United States *v.* Johnson, 68 U. S. 326, L. ed. 17, 597, the record failed to show that the required preliminary proceedings had been taken, but the grant recited that "the necessary steps and investigations were previously taken and made in conformity with the requirements of law and regulations," without stating what steps were actually taken, and this court accepted the recital as evidence of a compliance with the laws and regulations.

THE UNITED STATES NOT STRANGERS TO THE GRANT.

The United States having assumed the position and obligations of Spain in reference to all grants made prior

to the cession, and having solemnly agreed, by treaty, to protect the rights of property derived from them, cannot be considered strangers to the grant in controversy in this case; and this court knows judicially, from the public laws of the country, that the Hot Springs Reservation, in which the land sued for is located, has been surveyed as public land and is held by the United States. The act of April 20, 1832, sets apart four sections of land, including the Hot Springs, as a public reservation, and many other public statutes have been passed by Congress on the same subject. But even if this were not sufficient to justify a reliance upon the recitals in this grant as evidence of the facts stated, the character of the grant itself and the public sanction given to it, if it is a valid grant, by the stipulations of the treaty with Spain, and by the rules of international law, make its recitals binding, not only upon the United States as a Government, but upon all their citizens. It is a public grant, made by a public official having general authority to grant lands; if valid, it is recognized and protected by a treaty; its validity can be assailed only by impeaching the authority of the official to make this particular grant, or by alleging and proving fraud, and the latter cannot be done on a demurrer. Neither the United States nor any of their citizens can defeat the title claimed under this grant, if it is valid, or question the *prima facie* effect of the recitals contained in it, without establishing, or, at least, alleging, a better title to the same land derived from Spain, or France, or some other government possessing sovereign power over the territory, prior to the date of the cession. According to all authorities, the same rules of evidence apply in the case of a Spanish grant protected by a treaty with this country, as in the case of a grant of public lands made by our own authorized public officials, and every-

body is bound by the recitals contained in it, and it cannot be attacked collaterally. If a valid grant was made by Spain before the cession of the territory, it became, by the terms of the treaty as well as by the rules of international law, to all intents and purposes, the same as a grant made by the United States, because the United States, upon a full consideration, guaranteed it, thereby becoming legally a party to it.

The only question to be determined is whether the grant in controversy was binding on the King of Spain, according to the laws and usages of that country at the time of the recession of Louisiana to France by the secret treaty of St. Ildefonso, October 1, 1800, and at the time of the treaty of April 30, 1803, by which the province was ceded by France to the United States; for, if it was binding upon Spain it is equally binding upon the United States, not only by the law of nations, but by the express provisions of the Third Article of the Treaty with France.

Strother *v.* Lucas, 37 U. S. 410, L. ed. 9, 1137; Dent *v.* Emmeger, 81 U. S. 312, L. ed. 20, 838; United States *v.* Percheman, 32 U. S. 51, L. ed. 8, 604.

As was said by this court in United States *v.* Arredondo, 31 U. S. 691, L. ed. 8, 547, a title acquired from the former government of a ceded territory "is as much protected by the laws of a republic as the ordinance of a monarchy."

THE TRANSLATION OF THE GRANT AND CERTIFICATE OF SURVEY.

The original grant was before the lower court, and is here for the inspection of this court. While recognizing that only the original must eventually control, it was convenient and proper to set out a translation in the com-

plaint. We have felt that that translation did not give the meaning of the original as near as it might, and have had a translation made by one of the counsel in this case who would seem, from his training and acquirements, to be amply qualified for the task. He is the only native of the United States, so far as is known, who has ever received the degree of Licentiate in Spanish Law; is the author of "The Civil Law in Spain and Spanish America," a recognized authority on the subject, and has had much experience as counsel for the United States before international tribunals where Spanish law was to be interpreted and applied. We here insert his translation in full, indicating, by italics, so far as we can, where this differs from the translation given in the record:

"The governor and intendant of the province of Louisiana and West Florida and inspector of troops, etc.

"*Upon examination of the foregoing record of the proceedings taken by Don Carlos Trudeau, surveyor-general of this province*, concerning the possession *given by him* to Don Juan Filhiol, commandant of the post of Ouachita, of a tract of land, *meaning a square league*, situated in the district of Arcansas, on the north side of the river Ouachita, at about two leagues and a half distance from said river Ouachita, *it being understood* that this *tract of* land *shall be surveyed* so as to include the *place* known by the name of Hot Springs (Waters), as is besides expressed in the figurative plot or map and certificate of said surveyor Trudeau, and recognizing the same *to have been made in accordance with the rules of surveying, approving as we do hereby approve the said record*, using the *power* which the King has vested in us, *we do hereby grant* in his royal name, unto the said Juan Filhiol, the said league of land, in order that he may dispose of the same and the usufruct thereof as his own.

"We give these presents in our own hand, sealed with the seal of our arms, and attested by the undersigned secretary of His Majesty in this government and intendance.

"In New Orleans, on the 22d day of February, 1788.

"(Signed) ESTEVAN MIRO.

"By mandate of His Excellency.

"(Signed) ANDRES LOPEZ ARMESTO.

"Registered."

The complaint sets out that after this grant was made and delivered to Filhiol, the surveyor-general of the province, Carlos Trudeau, on the 6th of December, 1788, executed and delivered to Filhiol a certificate of measurement of the tract. A translation of this certificate is given in the complaint. The original was before the lower court and will be presented here. Our Mr. Walton has also made a translation of this which we give, again noting the differences with italics:

"Don Carlos Trudeau, *official* and *private land* surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of his Excellency Don Estevan Miro, brigadier of the R. ex. gob., intendant of the province of Louisiana, West Florida, etc., dated the 22d of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters, and in conformity with the aforesaid order, I certify having *surveyed* in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of

Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies in conformity with *the actual survey* of the 6th of the present month of December and of the current year 1788.

"(Signed) CARLOS TRUDEAU.

"D^{N} ESTEVAN MIRO,

"*Brigadier.*"

A Perfect Title in Filhiol.

We insist that these two papers alone disclose a perfect title in Filhiol. The power to make such title was in the governor. The O'Rielly regulations were more than complied with. There was a custom, not binding, nor always complied with, whereby the acquisition of a portion of the public lands by a citizen was made, as follows: He first prepared, or had prepared for him, a map of the tract he wanted, accompanied by a verbal description, which he presented to the governor with a request or prayer for a grant; second, the governor acquiescing in the request, the grant was made and the surveyor-general directed to measure, or survey, the land indicated; and, third, upon this survey being made the land was thereby segregated from the mass of the public domain, the floating grant became fixed, and the grantee legally possessed. The written regulations prevailing on the 22d of February, 1788, did not require all this. But whatever they did require was wholly complied with by complying with this custom. Filhiol, who was a trusted officer under the governor, went to him with a memorial (requete), which he signed on the 12th day of December, 1787, asking for a grant of the land; this was accompanied by a figurative map and a descriptive statement (proces verbal), which had been prepared by the sur-

veyor-general. The governor took these under consideration, and 40 days later, February 22, 1787, issued the grant. It was only made after an examination of the record of the proceedings taken by Trudeau, the surveyor-general; was made to Filhiol, who is described as the commandant of the post of Ouachita, for a square league which "shall be surveyed so as to include the place known by the name of Hot Springs (Waters)" as the same is "expressed in the figurative map and certificate of said surveyor Trudeau." The grant declares that the governor approved the record made up by Trudeau, and, "using the power which the King has vested in us, we do hereby grant in his royal name, unto the said Juan Filhiol, the said league of land in order that he may dispose of the same and the usufruct thereof as his own." These are the words of a present grant. The only condition, if there was any, was that the land should subsequently be surveyed. If this was a condition, it was a condition subsequent, and did not destroy the present nature of the grant. As soon as the survey was made the land was definitely and for all time severed from the body of public lands, and the title at once attached in the grantee and related back to the date of the deed. But the words in the grant relating to a future survey of the tract do not necessarily make such survey a condition subsequent, *or any other condition*, of the conveyance. They are: "It being understood that the tract of land shall be surveyed so as to include the place known by the name of Hot Springs," as expressed in the figurative plot and by Trudeau's certificate. It may well be that Miro, by the use of these words, had only in mind that Filhiol would want a more definite survey than was disclosed by the figurative plan and proces verbal, and hence wrote into the deed the precautionary instructions, that when

the tract *was surveyed* the lines should be run so as to make sure that the Hot Springs were included. The grammar of the sentence is not that the land "shall be surveyed," but that it shall be *so surveyed* "as to include the place known by the name of Hot Springs." This construction would not be inconsistent with the other parts of the instrument. It is previously recited that the surveyor-general had already given Filhiol possession, and every other declaration in the writing (other than the words relating to some future survey), are entirely consistent with a grant *in præsenti* without conditions. There can be no doubt but what the land could have been sufficiently identified by means of the figurative plan, the proces verbal, and the grant. A subsequent survey was not really necessary for that purpose. Thus we should contend most seriously if there was an absence of all proof that there had been a survey subsequent to the date of the grant,—that still the grant was complete and carried a perfect title into Filhiol.

But we are not required to urge such a contention. The subsequent survey was duly made. We present to the court the original official certificate to that effect. It declares its official character in the body of the instrument, and is signed by the surveyor-general. Trudeau's signature is familiar to every one who has examined the records of titles in the Louisiana territory. We are not aware that there has been even a hint that this certificate is spurious or the signature forged. The character of the paper and the chirography, and above all the appearance of the signature, leave no doubt in the mind of its genuineness.

We call attention at this point to the fact that the first line of the translation found in the complaint, reads: "Don Carlos Trudeau, *land* and *particular* surveyor of

the province of Louisiana, &c." Mr. Walton's translation, which we here present, reads: "Don Carlos Trudeau, *official and private* land surveyor, &c." We also now present for the first time a translation of the words heretofore omitted in the last line, their omission being indicated with stars. The omitted words are translated "the actual survey." This makes the latter part of the certificate read: "I certify having surveyed in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial, situated on the north side of the Ouachita river, in the district of Arkansas, at about two leagues and a half distant from said river, to be verified by the figurative plan which accompanies in conformity with the actual survey of the 6th of the present month of December and of the current year 1788."

Then considering the whole certificate, as we now present it, it carries upon its face conclusive proof of two important facts. (1) It is an official certificate of the surveyor-general of the province. (2) It proves that this survey was verified by the figurative plan which the governor had when he made the grant, and that such figurative plan and "the actual survey" conform. The float was fixed on the ground in conformity with the grant.

The contention in the Muse case that Trudeau's certificate was not an instrument of evidence "because it neither purports to be, nor is, an official document," loses all force in the light of a more perfect translation. He describes himself in the body of the instrument as the "official" surveyor of the province. It is a common rule of construction, so far as we know without exception, that the official character of a person, signing a document of this kind, appearing in the body of the writing, is quite as efficient to fix its character as though the office was written down after the signature. It is certainly suf-

ficient to throw the burden of proof on whoever may challenge its authority.

But the court knows judicially, not only as a historical fact, but from its own records and judgments in a great number of cases, that Trudeau was the surveyor-general of the province of Louisiana in 1788, and for a long time afterwards, and, even in the absence of these sources of information, it would be bound to assume, until the contrary was shown, that all persons acting in official capacities in the ceded territory were officers *de jure*.

The effect of the certificate was to put the grantee in possession of the land. In United States *v.* Hanson, 41 U. S. 196, L. ed. 9, 935, the court states:

> "There is a wide and marked difference in the effect of the certificate of the surveyor-general and a private individual who assumes to certify without authority. What the duties of the former are is well known from the proofs in many cases presented to this court."

Again:

> "The duty of confirmation, by the acts of Congress, is deputed to the courts of justice of the United States in execution of the treaty with Spain. It follows the same evidence that was accorded to the return of the surveyor-general by the Spanish governor, before the cession, is due to it by the courts of this country. The acts of the officer and the governor were both on behalf of the government; each, by his duty, was bound to protect the public domain, and to guard the law from violation; if the surveyor, therefore, by his plat and certificate, returned that he had surveyed the land at the place granted, not by the assertion only that it was at the place, but by a description in legal form that it was so, then the return was *prima facie* competent evidence, without

> further proof, on which the governor could found the confirmation. Plats and certificates, because of the official character of the surveyor-general, have accorded to them the force and character of a deposition; the same as Aguilar's certificate to a copy of the grant; as we held in the case of Wiggins. 14 Peters, 346, L. ed. 10, 481, pp. 199-201. See also United States *v.* Low, 41 U. S. 162, L. ed. 10, 923; Breward *v.* United States, 41 U. S. 143, L. ed. 10, 916, in both which it was expressly decided that the official return of the surveyor-general must have accorded to it the force and effect of a deposition."

While the certificate of Trudeau does not contain a full description of the land, by metes and bounds—which were not required in any case to be included in that document, it states that he had measured the league of land indicated in the memorial and refers for identification to the figurative plan "which accompanies" and which, with the proces verbal, is alleged in the complaint to have been lost. The certificate is legal evidence of the fact that he had measured the tract "to include the spot known by the name of the Warm Waters," which it was the expressed purpose of the governor to grant, and that he had thereby, according to the rules of the Spanish law, put the grantee in possession of that particular "site or locality." This court said in the Arredondo case, that "possession does not imply occupation or residence, but every man is in the legal seizin and possession of land to which he has a perfect and complete title"; and in Scull *v.* United States, 98 U. S. 410, L. ed. 25, 164, and many other cases, it was held, that the legal effect of a survey, under the laws of Spain, was to put the grantee in the instant possession of the land, unless it was at the time occupied by the Indians, in which case he had legal possession, but his right of actual occupancy did not accrue until their title was extinguished."

We have heretofore shown that recitals in a grant were binding on parties and privies; that in Glenn *v.* United States, 54 U. S. 250, L. ed. 14, 133, the court held that "the petition, and the paper signed by Delassus (commandant) must be taken together," and "whatever is stated in either as to facts or intent must be taken as true"; and that in Hornsby *v.* United States, 77 U. S. 224, L. ed. 19, 900, the court declared "the grant recites that the necessary steps were taken, and something more than mere surmises, at this day, are necessary to show that the recital is false." Assuming this to be the law both as to the grant and the certificate, we submit that the two papers, as above contended, prove that in this grant to Filhiol every step was taken, every requisite complied with that can be found in any law, or regulation, or custom existing in Louisiana in 1788. The memorial of the grantee, the figurative plan, the proces verbal, the grant, and the final survey which fixed possession in the grantee are all present.

While this was the customary mode of proceeding to secure a title to the public lands in the province of Louisiana, all these steps were not absolutely necessary, especially in the cases of grants for public services, nor was it necessary that they should be taken in the precise order here stated. If a survey had been made on the ground before a *requete* was presented and was approved by the governor and a grant made *in præsenti* for the land described in the survey, can it be doubted that a perfect title would pass? On the other hand, if an absolute grant *in præsenti* was made in the first instance, without a *requete*, or survey, but a survey was ordered and afterwards made on the ground, so as to identify the land, can it be doubted that a perfect title would pass, without the execution of another grant? See United States *v.* Hughes,

54 U. S. 2, L. ed. 14, 25; U. S. *v.* Castant, 53 U. S. 437, L. ed. 13, 1056. The governor, having undisputed power to grant lands, could act whenever he chose and upon any motive or information that was satisfactory to himself, and his grant would be valid if the land was identified and segregated from the public domain, either by a survey, whenever made, or by putting the grantee in possession in some other mode. The grant need not even be in writing, for there was nothing in the civil law of Spain, or in the regulations promulgated in the province of Louisiana, making any difference in this respect between the transfer of real property and the transfer of goods and chattels. See Sanchez *v.* Gonzales, 11 Mart. 207; Le Blanc *v.* Martin, 3 La. 47; Landey *v.* Martin, 13 La. 1.

In United States *v.* Castant, cited above, the course usually adopted in making grants of the crown lands in the province of Louisiana was not followed; there was no *requete*, and no survey was ever ordered, except orally, but one was made by Pintado, a deputy surveyor, and, afterwards, Don Carlos Laveau Trudeau, without any order from the governor, except an oral one, made a certificate stating that he had delivered possession of the land to Donna Maria Manetta Trudeau, whereupon the governor, "recognizing" the survey and certificate, and "approving them," made the grant; and this court said that "the effect of these proceedings on the part of the Spanish governor was to vest in the grantee a perfect legal estate in the subject granted, the *titulo in forma*." Many other cases decided by this court might be cited to show that there was no fixed and unalterable order of proceeding required as a condition to the validity of the grant, but, as it is admitted that all the preliminary steps were, in fact, taken in the usual and regular order, in the

present case it is unnecessary to extend the argument upon this point.

Again, as bearing upon the question whether or not this was a grant *in præsenti*, we recall the case of the United States *v.* Castant, 53 U. S. 440, L. ed. 13, 1056. The granting words in the grant then under consideration were, "and recognizing the same (the survey, &c.), approving them, as we do approve them, &c., we grant in his royal name the lands, &c., that she may use and dispose of them as her own property in conformity with the aforesaid acts." The granting words in the grant to Filhiol are, "approving, as we do hereby approve the said record, using the power which the King has vested in us, we do hereby grant in his royal name, unto the said Juan Filhiol, the said league of land, in order that he may dispose of the same and the usufruct thereof as his own."

Hence, whether the Filhiol grant was one requiring a subsequent survey to definitely locate the tract and put the grantee in possession, or whether it was really without such condition, like the Castant grant, it was still a grant *in præsenti*. If both title and possession did not pass to Filhiol when he received the grant from his governor, the title certainly did become fixed when he received possession by virtue of Trudeau's certificate.

Mexican Grants and Spanish Grants.

The rules and principles by which this and other courts have tested the validity of grants for land in the territory acquired from Mexico under the treaty of Guadalupe Hidalgo, and by the subsequent purchase, are essentially different in many respects from the rules and principles applicable to grants made in the territory acquired from France by the treaty of 1803, and it is appa-

rent that a failure to observe the distinction between them lies at the foundation of many of the erroneous conclusions reached by the court below in its opinion in the Muse case. In Mexico, the authority of officials to make grants was expressly defined and limited by legislative enactment in 1824, and by positive regulations adopted in 1828, and the officials had no power to make a substantial departure from the requirements of the law and regulations. Unlike the royal governors of the Spanish provinces, they had no general or independent authority to make grants of the public lands, or to alter the manner or form in which they should be executed in order to pass complete title to the grantees. Every substantial requirement, even in matters of form and procedure, had to be substantially complied with, not only by the grantee but by the official as well, and a failure so to comply with them vitiated the grant, or, at least, prevented it from passing a perfect legal title, whatever the equities created by it might be. Certain requirements of the law and regulations were very properly held to constitute conditions precedent, and others, conditions subsequent, all which had to be substantially performed, or the title would not vest in the first instance; or, having vested, would be defeated afterwards. But this was not a rule that could be properly applied to grants in the Spanish provinces acquired in 1803, as we have already endeavored to show, and, consequently, very few, if any, of the decisions on Mexican grants have any bearing upon the questions involved in this case. See Fuentes *v.* United States, 63 U. S. 443, L. ed. 16, 376.

In Hornsby *v.* United States, 77 U. S. 224, L. ed. 19, 900, the proceedings necessary in obtaining grants of land from the government of Mexico under the law of August 18, 1824, and the regulations of November 21,

1828, are stated in considerable detail, and the effect of a failure to comply substantially with all the requirements is considered and decided. The case shows, however, that notwithstanding the limited authority of the officials, a strict and literal compliance with all the requirements and laws will not be exacted in order to make the grant valid, and that many presumptions arise in favor of the regularity and legality of the proceedings.

THE DEED FROM FILHIOL TO BOURGEAT WAS A JUDICIAL AFFIRMATION OF THE TITLE.

The complaint sets out that on the 25th day of November, 1803, Filhiol sold and conveyed the tract in question to his son-in-law, Narcisso Bourgeat, the deed being passed before Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry and military and civil commandant of the district and jurisdiction of Ouachita, which deed was witnessed by Señor Baron d'Bastrope and Don José Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all of whom were principal men in Ouachita at the date thereof. The deed was in Spanish, but a translation is embraced in the petition, and a duly authenticated copy is filed as an exhibit.

The position we have taken as to the finality of the grant in controversy, and its conclusive effect as evidence of title in the grantee, is justified by the subsequent proceedings of the Spanish authorities in Louisiana when Filhiol thus made the conveyance, or passed the title, to his son-in-law. As already stated, the new regulations of Morales were not promulgated until July 17, 1799, more than eleven years after this grant was made, and, consequently, they could not in any manner affect the

regularity or validity of the grant itself; but they were applicable to all subsequent private conveyances of land *obtained by concession*, and, therefore, the deed, or act, by which Filhiol conveyed, or passed, the land to Bourgeat, was governed by them. The seventh article of the Morales regulations is as follows:

> "To avoid for the future the litigations and confusions of which we have examples every day, we have also judged it very requisite that the notaries of this city and the commandants of posts shall not take any acknowledgment of conveyance of land obtained by concession, unless the seller (grantor) presents and delivers to the buyer the title which he has obtained, and in addition being careful to insert in the deed the metes and bounds and other descriptions which result from the title, and the *proces verbal* of the survey which ought to accompany it."
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> 2 White's Comp., 236.
>
> 5 Am. Stat. Papers, 591.

Thus, the conveyance or act passing the title of land which had been obtained by concession from the crown was made a judicial proceeding before the notary or commandant, as the case might be, and this was done, evidently, from the language of the order, to prevent the confusion resulting from the conveyance of lands to which the "seller" had not acquired the complete legal title by grant. The title—that is, the papers showing the title—had to be presented and delivered to the purchaser in the presence of the official, and the metes and bounds and other descriptions "resulting from the title" and the *proces verbal* were required to be inserted in the deed; and the notaries and commandants were forbidden to sanction the transaction, unless these conditions were complied with That this was a judicial act having all the force

and effect of a judgment or sentence, according to the Spanish civil law, cannot, we think, be doubted. The very object of the ordinance or regulation was to have the validity of the title ascertained and attested by a public officer, who was responsible to the governor and the King for all his official acts; and it must be borne in mind that the separation of the legislative, executive and judicial functions, which constitutes one of the most valuable features of our institutions, was, at that time, wholly unknown to the Spanish system of government. Judicial power might be, and frequently was, conferred upon officials whose ordinary duties were purely executive or ministerial. That this was a judicial act is shown by all the authorities on the subject.

On the 17th day of July, 1803, President Jefferson addressed a letter to Daniel Clarke, enclosing a series of questions concerning the boundaries, population, trade, etc., of the province of Louisiana, and the state of its laws and regulations pertaining to grants of land and other matters, and the answer to these questions, but without date or the name of the author, is given in 2 White's New Comp., p. 690. For Mr. Jefferson's letter, see Jefferson Manuscripts, Department of State, Vol. 9, Series 1, No. 109. In the answer which, also, is in the Department of State, it is said: "The governor (in his civil capacity) is sole judge of the supreme tribunal of the province. Two alcaldes hold each an inferior tribunal in the same place (city of New Orleans), and the commandants of the districts are judicial officers within their jurisdictions." Speaking of the alcaldes or syndics, he said, "they are conservators of the peace, take cognizance of petty complaints, and report the state of his quarter to the commandant. This magistrate (the commandant)

keeps the records of his district, and officiates as a notary in passing all sales and bargains, and transfers of real property, which, under this government, are not valid when done between private persons; every document of this nature is in the original matter of record, and the parties are furnished only with copies certified by the commandant (or notary where there is one established) which are received as evidence in courts of justice within the province." 2 White's New Comp., 965-6. White, who was thoroughly versed in the Spanish language, laws, regulations and customs, says, in his opinion on the Renaut claim:

> "Every sale before a governor or commandant, under the Spanish government, is equivalent to a judicial sentence, and is, in fact, in all respects, the approval of the title of the grantor. The officers before whom a Spanish bill of sale is passed are bound to see that the person making it exhibits his title, and that title in the *first sale* is the grant from the proper officer of the crown. The purchaser takes a notarial copy of the bill of sale, which he exhibits to succeeding vendees in the deraignment of title to the last holder. Concessions upon conditions cannot be sonveyed until there is proof of the performance of the condition. In the case of Renaut, his grant was absolute; and, by the French laws, that grant was exhibited to the notary as evidence of his right to sell, and it is made the duty of the notary to see that he has a complete *bona fide* title.
>
> "In the tribunals of France and Spain, upon a suit to recover possession of lands, what we would call the plaintiff in ejectment, is only bound to exhibit his notarial bill of sale, which is conclusive without deraignment of his title, under their peculiar system."
>
> 1 White's New Comp. App., 719-20.

According to the Spanish law, although all the preceding evidences of title might be lost or destroyed, it would not be necessary even to account for them, or prove their contents, as the judicial sentence of the commandant or notary, unless properly impeached, would be conclusive of the fact that all the necessary proceedings had been taken, and that a complete legal title had been vested by the grant from the crown, giving to the grantee full ownership of and dominion over the property, with a lawful right to sell and convey it. Even in the case of public officers whose functions are not judicial, the legal presumption is that they have not exceeded their powers, or executed them in a defective or erroneous manner, and this rule applies to the acts of foreign as well as domestic officials. After stating the familiar proposition that an official act is *prima facie*, regular and valid, this court said in Stother *v.* Lucas, *supra:* "The same rule applies to the judicial proceedings of local officers to pass the title to land according to the course and practice of the Spanish law in that province"—page 438. See, also, Murdock *v.* Gurley, 5 Rob. (La.) 457; 17 La. 220; Choppin *v.* Michael, 11 Rob. 236, in which the court also said sales of land in parole were valid under the Spanish law. But we deem it unnecessary to multiply authorities in support of this el mentary principle of the common and civil law, principle which is absolutely essential to the orderly administration of justice by the courts and the effective execution of the law by executive and ministerial officers.

The regulations of Morales did not require the commandant or notary to make any certificate, but it was the custom to do so, and in this instance Don Vincente Fernandez Feijeiro certifies that he was military and civil commandant of the district and jurisdiction at the date of

the act; that the parties were known to him; that the act was affirmed and witnessed by Baron de Bastrop and others, whose names are given, and that it was done within his jurisdiction. Nor did the regulations require the presence, as witnesses, or otherwise, of persons other than the commandant, or notary, and the parties, when the act was done; but if the attestation of the other subscribers added nothing to the authenticity of the deed, it certainly detracted nothing from it. The practice, however, of having these acts or deeds executed in the presence of others besides the commandant, or notary, appears to have been customary, and the extent to which custom and usage entered into and became a part of the law in the Spanish provinces is shown in several of the decisions heretofore cited.

Although the treaty was made April 30, 1803, formal possession of the territory embraced in it was not delivered to the United States until December 20, 1803, and it is the established rule that the laws of a conquered or ceded country remain in force until actually altered by the new sovereign.

Keene *v.* McDonough, 33 U. S. 308, L. ed. 8, 955.

The Description in the Bourgeat Deed.

It will be observed that the regulations of Morales required the notaries and commandants, when titles were passed before them, to be "careful to insert in the deed the metes and bounds and other descriptions which result from the title, and the proces verbal which ought to accompany it," and a reference to the conveyance from Filhiol to Bourgeat shows that it contains a full description of the land, which must, under the regulations, have been taken from the plan and proces verbal produced before

the official at the time. The deed describes "a tract of land with a front of eighty-four arpents and a depth of forty-two arpents on each side of the stream called 'La Source d'Eau Chaude,' about two leagues distance from its entrance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the crown" (Rec. 13); and the fact that it contains this particular description of the land, which could have been legally procured only from the title and proces verbal, is evidence, if any were required, that the regulations were complied with by the production of the documents before the official when the conveyance was made. It is alleged in the complaint, and admitted, that the lost survey and proces verbal described the land as set forth in this deed.

The commandant had no authority to insert in the conveyance any other description than that found in the title presented by the grantor; and if the conveyance was, under the laws of Spain, a judicial act, as we have endeavored to show it was, the existence of the plan and proces verbal, with a good and sufficient description of the land granted, is conclusively established, so long as the proceeding stands unimpeached. The legal effect of such evidence cannot be avoided by mere inferences or surmises that the description might have been procured from other sources, for, under the law, the official had no right to procure it from any other source, and, until his conduct is successfully impeached, the court is bound to assume that he performed his duty.

If there was, as is alleged and admitted, and as is also shown by the judicial sentence of the Spanish tribunal, an official survey and proces verbal describing

the land, and a report or certificate of the surveyor, it was not necessary that such description should be inserted at length in the body of the grant. Under the regulations, the proces verbal was required to be annexed to the grant, and constituted a part of the title. In United States *v.* Boisdore, 52 U. S. 62, L. ed. 13, 605, the court said that if the land had been surveyed by Trudeau and he had certified that it was at the place granted, and the survey had been returned, "then such survey would identify the land granted;" and in Carondelet *v.* St. Louis, 66 U. S. 179, L. ed. 17, 102, the court said: "If there be no boundary the grant is vague and cannot be identified, and the grantee takes nothing. The survey here was the completion of the title, although it succeeded the act of granting the land. It defined the grant." See also Blake *v.* Doherty, 18 U. S. 359, L. ed. 5, 109; Magwire *v.* Tyler, 75 U. S. 650, L. ed. 19, 320; Cox *v.* Hart, 145 U. S. 376, L. ed. 36, 741; Scull *v.* United States, 98 U. S. 410, L. ed. 25, 164.

In Buyck *v.* United States, 40 U. S. 215, L. ed. 10, 715; the court said: "We apply to the case the laws and ordinances of the government under which the claim originated; and that rule, which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony." United States *v.* Miranda, 41 U. S. 153, L. ed. 10, 920; United States *v.* Lawton, 46 U. S. 10, L. ed. 12, 27; Villalobos *v.* United States, 51 U. S. 541, L. ed. 13, 531; De Vilemont *v.* United States, 54 U. S. 261, L. ed. 14, 138; United States *v.* Cla-

morgan, 101 U. S. 822, L. ed. 25, 836. In the present case the plaintiffs in error do not rely upon extraneous testimony, but upon an official survey and proces verbal, which are alleged to have been regularly made at the proper time, and which constitute a part of their title, but are not actually exhibited because they have been lost.

It appears, therefore, from the admitted allegations of the complaint, from the official recitals in the grant itself, and from the judicial sentence of the commandant on the 25th day of November, 1803, while the Spanish authorities were still in possession and control of the ceded province, that Filhiol held a complete and perfect title to the land in controversy, by the concession or grant from Governor Miro.

The failure to use any word or clause designating a surveyor, or indicating a purpose to execute a further assurance of title, considered in connection with the regulations and practice under them, the absolute terms of the grant itself, its recitals, and the subsequent judicial sentence by a tribunal, provided for the express purpose of passing upon the validity of titles held by concession, ought to be conclusive of this question. That tribunal had before it the original grant and other papers connected with it, written in a language which it was competent to interpret, and attested by signatures with which it was familiar, and it cannot be presumed, contrary to its unimpeached judgment, that the title was an imperfect one under the laws of the province in which the land was situated.

Did Indian Occupancy Defeat Filhiol's Title?

Don Juan Filhiol was a distinguished and trusted official in the Spanish service, and the land granted to him was situated in his district and jurisdiction, not very

remote from the post of Ouachita, at which he was stationed. All that may be said about the land being located in the midst of an impenetrable wilderness and occupied by hostile Indians, is foreign to the case, even if true; but there is no evidence of it, and, on the trial of a demurrer, there could be none, except such as is afforded by the authentic history of the country at that period. We know that region of country was occupied by the Quapaw Indians, but they were peaceable, and held the land in subjection to the superior title of the Spanish crown. There is nothing to show that Filhiol and Trudeau and his deputies might not go upon this land without molestation or hindrance, whenever they chose, and, in fact, the latter made many surveys in that part of the country, as will be seen by a reference to numerous decisions of this and other courts; and in a report made by Filhiol to the governor, which is found in some printed testimony submitted to the Court of Claims (a copy of which in Filhiol's own handwriting is now here for the inspection of the court), he gives an account of his exploration and survey of the whole province under his command, in which it appears that he visited the Hot Springs. We find in the instructions given Filhiol by Miro at the time he placed him in command the following: "13th. One of his first duties shall be that of making an exact description as far as he shall be able, of his district and its environs, which shall be sent to the government, in which he must report without the least hesitation, the discoveries which he is able to make of any description in a country where nature seems to invite man to cultivate the earth." (The original instructions are submitted to the court for inspection.)

In pursuance of this direction, Filhiol seems to have made a very complete survey, in person, of the territory, and,

among other things, reported to Miro that "The Hot Springs are in a small bayou, which empties into the river on the right about ten leagues above the falls. The water starts from a rock boiling hot, but becomes modified as it flows and joins the waters of extremely cold springs. These waters are as clear as crystals." (See evidence for complaint in Court of Claims No. 17,196.)

In an article in The Monroe Bulletin, of Monroe, La., of March 26, 1884, is an interesting account of the presentation by Hippolite Filhiol, to the Parish of Ouachita, of the sword of his grandfather, Juan Filhiol, which had been presented to the latter by Governor Miro. The data for this article would seem to have been procured from papers in the keeping of Filhiol's descendants. After stating his appointment by Miro as commandant of the post of Ouachita, the article proceeds:

> "The difficulties of his trust can be more easily imagined than described. Yet, by the wisdom of his conduct and the justice of his rule, he gained the confidence of the savage, and the affectionate esteem of the white man. To these more than to any other facts is to be ascribed the singular exemption of the Ouachita country from Indian massacres. * * * Don Juan proceeded up the Ouachita river as high as *Ecore a Fabry*, now Camden, Arkansas. From this point he made reconnoissances throughout south Arkansas, and in one of these his men discovered the wonderful Hot Springs. Upon his report of his discoveries to the governor he was advised by his friends *and the officials in New Orleans* to make application for a grant of the springs. This he did in the year 1787, and Miro made him a grant of one league square, etc."

This article from which we quote, is also found in the printed evidence in case 17,196 in the Court of Claims.

It is brief, and we print it, with the first instructions from Miro to Filhiol on appointing him as commander of the said district, and Filhiol's report, from which we have also quoted, as exhibits to our brief.

Here is historic evidence that the Indians were friendly to Filhiol; that he went everywhere within his province, and that he himself discovered the Hot Springs—reporting his discovery to his superior. Hence, that it was entirely practicable to make an actual survey of this land in 1787 and 1788 would scarcely be open to controversy, even in the absence of allegations and admissions that such survey was, in fact, made.

In the Muse case the Indian occupancy was made the basis of a contention that the grant was void, and this was insisted upon, in opposition to the very authorities cited by counsel for defendant in error in the argument below. The power of the British authorities to make valid grants of land in Florida, subject to the Indian right of occupation, when that country was held by Great Britain, and the power of the Spanish authorities to make similar grants in Louisiana and elsewhere within the jurisdiction of Spain, has been too often asserted by this court to be questioned or re-argued now. In Mitchell *v.* United States, 34 U. S. 711, L. ed. 9, 283, which involved a British grant in Florida, the court said that, "subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislature while the lands remained in possession of the Indians, though possession could not be taken without their consent;" and in Chouteau *v.* Malony, 34 U. S. 137, L. ed. 9, 78, involving a Spanish grant, the power of the governors of provinces to grant public lands "to which a title and instant possession could not be given to the grantee"

was recognized, but it was held, that in making sales of lands occupied by Indians they were bound by certain laws, usages and customs made for the protection of the Indians, and then it was said that "they" (the grants) "did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it." This rule has been re-affirmed in many cases, and there are none to the contrary, so far as we have been able to discover. See United States *v.* Fernandez, 35 U. S. 303, L. ed. 9, 303; Johnson *v.* McIntosh, 21 U. S. 543, L. ed. 5, 681, where this question is fully discussed by the court.

The quotation from Marsh *v.* Brooks, 55 U. S. 513, L. ed. 14, 522, relied upon on the other side, had no reference whatever to grants made by the Spanish crown. The court was then discussing a question arising under the treaty between the United States and the Sac and Fox Indians; but the case involved, also, the validity of a Spanish grant made while the land was occupied by the Indians, and the grant was sustained. The court said that "the county and town of St. Louis, the seat of government of Upper Louisiana during the existence of the Spanish colonial government there, the post of New Madrid, the county, town and post of St. Charles were all within the cession made by the Osages, and within which cession lay a great mass of Spanish orders of survey and grants, in regard to which this country has been legislating and adjudicating for nearly fifty years, without any one ever supposing that such concessions were affected by these loose Indian pretensions set up to the country at the time when the concessions were made; pretensions that the Spanish government notoriously disregarded, further than a cautious policy required."

The proposition established by all the decisions upon this question is, that grants made by the Spanish authorities while the land was occupied by the Indians were valid and passed the legal title, but that the grantees took the land subject to the Indian right of occupancy, and, therefore, were not entitled to enter and hold actual possession until that right was extinguished.

Statute of Limitations.

One of the many unusual features of the argument in the Muse case was that the statute of limitations was invoked to sustain a demurrer to a complaint which alleges a wrongful possession of land for only a little more than two years. We admit that, if the plaintiff, in an action for the recovery of real estate, should allege in his complaint that the defendant had been in the continuous possession of the land for a longer period than that prescribed by the statute, holding and claiming it as his own against the plaintiff and all others, and that he, the plaintiff, was not entitled to the benefit of any saving clause, or other exemption, a demurrer might lie, because the party would have plainly negatived his own right; but there is no such case presented here, and we cannot suppose that one ever will be presented. The application of statutes of limitation does not depend upon the age of the plaintiff's title but upon the duration and character of the defendant's possession; and it would be a manifest perversion of the law to permit one man to take possession of vacant land belonging to another and hold it against him and his heirs simply because the title of the owner was old.

The only statute relied upon as a bar by counsel in the Muse case, was the act of June 11, 1870 (16 Stat. 149),

which authorized any person claiming title to the whole or any part of the four sections known as the Hot Springs reservation, to institute suit against the United States in the Court of Claims, and providing that, "no such suits shall be brought at any time after the expiration of *ninety days* from the passage of this act, and all claims to any part of such reservation upon which suit shall not be brought under the provisions of this act within that time, shall be forever barred." This was an enabling act, authorizing suits to be brought against the United States, which, otherwise, could not have been maintained, and conferring jurisdiction upon a special tribunal, which, otherwise, could not have heard the cases. It was really intended to provide for the settlement of certain claims of a different character from this then being urged before Congress, but its provisions were sufficiently comprehensive to embrace this case, as was afterwards decided by the Court of Claims. Filhiol *v.* United States, 28 Court of Claims, 110.

It would be unreasonable in the highest degree to suppose that Congress, even if it had the power, which we deny, intended to confiscate perfect titles to land held by citizens residing more than a thousand miles from the place where the court was held, simply because they might fail to sue within the short period of ninety days. It is more than probable that the plaintiffs in error never even heard of the act until long after the prescribed time had expired. But the Court of Claims, in the case referred to, gave the act a just and reasonable construction, holding that the bar was upon the jurisdiction of the particular tribunal and not upon the right of the claimant or title-holder; and this was in accord with the decision of this court in United States *v.* Percheman, 32 U. S. 51, L. ed. 8, 604, where more than a year had been allowed by the act. The pro-

vision was, that all claims not filed within the time prescribed were "to be void and of none effect," but Chief Justice Marshall said: "It is impossible to suppose that Congress intended to forfeit real titles not exhibited to the Commissioners within so short a period;" and he held that the only effect of the provision was to prevent the Commissioners from allowing claims not presented within the time.

The Circuit Court in the Muse case, however, held that this action was barred, not only by the act of June 11, 1870, relied on by counsel, but also by the act of May 26, 1824, providing for the institution of suits to try the validity of claims to land in the State of Missouri and the Territory of Arkansas (4 Stat. 52), which was several times extended, the last extension having been made by the act of June 17, 1844 (5 Stat. 676). If the plaintiffs in error have not a complete legal title to the land in controversy, they cannot recover in this action, no matter whether it is barred by statute or not; if, on the other hand, they have a complete legal title, it is perfectly clear that it is not barred by the statute of 1824, or by the acts passed from time to time continuing that act in force, because this court has always held that they embraced imperfect titles only. In United States *v.* Castant, 53 U. S. 437, L. ed. 13, 1064, the judgment of the court below was reversed on the ground that the title was a perfect one, and, therefore, could not be submited to the court under the law. Magwire *v.* Tyler, 75 U. S. 650, L. ed. 19, 320; United States *v.* Wiggins, 39 U. S. 334, L. ed. 10, 481; United States *v.* Roselius, 56 U. S. 31, L. ed. 14, 587; United States *v.* Davenport, 56 U. S. 1, L. ed. 14, 575; United States *v* Reynes, 50 U. S. 127, L. ed. 13, 74.

Complete titles to land in the territory acquired

from France by the treaty of 1803, this court has declared, needed no legislative or judicial confirmation; they were fully protected by the third article of the treaty itself, which is a part of the supreme law of the land, and, until abrogated, is as binding upon the courts as a provision of the Constitution. It is the duty of the United States to protect such titles, and if the lands come into their possession they are held in trust for the Spanish grantee or his heirs, and a State cannot forfeit them by a limitation law; and if it should attempt to do so, and the courts of the State should sustain the validity of the act, a case would be presented for the exercise of the appellate jurisdiction of this court, in order that the Constitution of the United States, and a treaty made in pursuance of it, might be vindicated and enforced. In such a case, the question would be directly presented, whether a State of the Union could, by legislative enactment, destroy a right which the United States, by a treaty made in pursuance of the Constitution, had agreed to protect. Although the several American States, during the Revolutionary War were, *de acto* as well as *de jure*, in the possession and actual exercise of all the rights of sovereign and independent governments, this court held in Ware *v.* Hylton, 3 U. S. 199, L. ed. 1, 568, that an act of the State of Virginia, passed in 1777, permitting creditors to pay debts due to British subjects into the treasury of the State, and thereby discharge the obligations, was annulled by the provisions of the treaty of peace with Great Britain, concluded in 1783, and that the debts were revived and could be sued for and collected. The act was passed and the treaty was made before the formation of the Constitution, but the court gave to the Constitution a retroactive effect, and held that the treaty annulled the State law and revived the debts.

Upon the principles established in that case, which have never been disputed, it seems quite clear that no State could forfeit or destroy a title derived from a grant which the United States are bound by treaty to protect, and that should it be apparent that a State limitation law would have that effect, the courts would be compelled to declare it null and void, so far as it applied to such grants. Treaties can be abrogated or repudiated only by the political department of the government, and, while they remain in force, it is the duty of the judicial tribunals of the United States, when a proper case arises, to see that all the rights secured by them are respected.

Congress can declare when and in what manner and within what time suits may be instituted against the United States, because they are not suable at all, except by permission of that body; but it has no power to pass laws prescribing the time within which individuals may bring suits against each other in the State courts, or in the courts of the United States sitting in the States, except by taking away the jurisdiction of such courts after a certain period shall have elapsed, which would, of course, leave the titles of the parties unimpaired. It may declare that no suit shall be maintained in the courts of the United States to recover real estate which has been adversely held for a stated period; or, in other words, it can deprive the party of a remedy in the courts of the United States in such cases, but it cannot bar or destroy the right of the real title-holder so as to prevent him from suing anywhere else. His right would still exist, notwithstanding the legislation of Congress, and might be asserted wherever a tribunal could be found with jurisdiction to enforce it.

If the grant to Filhiol invested him with a valid legal title, the land in controversy became his property, and, at

his death, became the property of his heirs at law; and as such it was, and now is, protected, not only by the treaty and international law, but by every guarantee in the Constitution. The United States, as parties to the treaty, cannot hold it adversely, according to the legal definition of the term, without violating the obligation imposed by a treaty. If they could take possession of lands legally granted by Spain to an individual and hold them adversely to the real owner, thereby acquiring a title superior to the one they had agreed to protect, or, which is the same thing in effect, thereby defeating a title which they had agreed to protect,the stipulation in the treaty and the rule of international law, which this court has always recognized, would be of no practical value whatever. Such a construction of the rights and obligations of the parties would enable the United States, which cannot be sued except with their own consent, not only to appropriate the very titles they had solemnly agreed to protect but to take the property of the citizen without his consent and without making compensation, as required by the Constitution.

But when and how did the United States acquire such an adverse possession of the land in controversy as would entitle them to rely on a statute of limitation against the perfect title of a Spanish grantee? The Indian title was not extinguished until April 24, 1818, and the grantee had, therefore, no right to enter and occupy the land until that date; and nothing more was done by the United States until April 20, 1832, when a public reservation was provided for, but no actual possession taken. It was not even surveyed until 1838. At what date any one who could have been sued by the plaintiffs in error was actually put in possession of the particular parcel of land in con-

troversy does not appear, but whenever it was the person went there as the agent or tenant of the United States, and held possession for them, that is, the United States, by their agents or tenants, have been, and are now, holding the possession of land, which, if the Spanish grant was valid, rightfully belongs to another, whose title they have, by a treaty, guaranteed and agreed to protect. The relations existing between the parties forbid any inference or presumption in favor of an adverse possession; if it exists, or has ever existed, it involves the renunciation of a trust and the violation of a treaty, and if it can be established at all in such a case, it must be done by evidence of unequivocal and notorious acts or declarations demonstrating a purpose to exclude the real owner and all others, and to claim the title free from any trust or judiciary obligation of any kind.

This case is clearly distinguishable from Stanley *v.* Schwalby, 147 U. S. 508, L. ed. 37, 259, in which the court, though not expressly deciding that the United States could plead a State statute of limitations, held that a public officer in possession of property owned or claimed by the Government, when sued in tort, might protect himself by such a plea. In that case, the United States had purchased, paid for and improved the land, without notice of any outstanding title, and had incurred no obligation to protect the rights of the real owner if one should present himself. They held the land in precisely the same manner that individuals ordinarily hold their estates, subject to no trusts or obligations in favor of other claimants; but, notwithstanding these facts, Mr. Justice Field dissented in an opinion, to which we beg leave to refer for a citation of authorities and for a definition of adverse possession. Of course, one who confesses that he holds as agent or

tenant of another cannot plead adverse possession in himself, because that would be inconsistent with the admitted agency or tenancy; he must rely upon the adverse possession of his principal or lessor, and, if the principal or lessor is, by reason of a trust or a covenant, disabled from disputing the title of the plaintiff in that manner, so is the agent or tenant.

If the plaintiffs in error have failed to show in their pleadings that a valid grant for the land in controversy was made to their ancestor, they have no case; but if they have shown that such a grant was made, we respectfully submit that no statute of limitations can be successfully pleaded against them by either the United States or their agents or tenants, and that most assuredly no such statute can be applied by the court on the hearing of a demurrer.

THE DOCTRINE OF ABANDONMENT CANNOT APPLY.

The doctrine of abandonment, which may be urged here, has no application to perfect titles. Where a party neglects for an unreasonable time to take the necessary steps to complete his title, or fails for an unreasonable time to perform conditions upon which the grant was made, or fails, when reasonable opportunity has been offered, to apply for the confirmation of an incomplete title, it may properly be held that he has abandoned such rights as he originally had; but if he has completed his title, and there are no conditions attached to it, as is the case here, no rule of law or equity will justify a court in declaring that it has been abandoned, unless there has been some element of fraud or deception in his conduct, whereby others have been induced to acquire, in good faith, rights or interests in the property which it would be unjust to disturb.

In a case like this, where no intervening rights are shown,

and where the property continues to be held by the original grantor, or by another who has succeeded to the rights and assumed all the obligations of the original grantor, it would be grossly inequitable and unjust to presume an abandonment from mere lapse of time. In every case the question depends upon facts and circumstances which cannot properly be alleged in the complaint and cannot be inquired into on a demurrer. Lapse of time is only one of the facts to be considered, and is not of itself sufficient to defeat a recovery; for, as this court said in Stanley *v.* Schwalby, "In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession or of the abandonment of claims by another, where an action cannot be brought, as the action itself when it can." The history of this grant and the claim under it, when disclosed at a trial on the merits, will show that neither the title nor the right of occupancy which did not accrue until 1818 has ever been abandoned, but that, on the contrary, they have been repeatedly asserted in memorials to Congress and otherwise, and denied only because the written evidence of title could not be produced.

In the foregoing argument, outside of that portion relating to the jurisdiction of this court, we are greatly indebted to the able and exhaustive brief filed in the Muse case on behalf of the plaintiffs in error by Messrs. J. G. Carlisle and Logan Carlisle.

J. H. McGOWAN,
Attorney for Plaintiffs in Error.

WM. F. VILAS,
Licentiate CLIFFORD S. WALTON,
Of Counsel.

Exhibit A.

Gov. Miro's Instructions to Filhiol.

Instructions which shall be observed by M. Filhiol, commandant of the new post of Ouachita.

1st. He shall maintain the best understanding and harmony with the commandants of the posts of Nachitoches, Atak-apas, Opeloussas and Pointe Coupée. He shall arrest and also return deserters, as well as all other subjects, who shall present themselves or arrive within his jurisdiction without passport, giving notice to the general government.

2d. He shall see that the Indians do not disturb the peace of the inhabitants, and of their hunting-grounds, and in case the inhabitants shall have need of help he shall furnish it to them promptly; but before he shall take arms against the Indians, he shall use every means possible to bring them to peace, making them understand that we belong to the Great King of Spain, Lord of all the lands that they inhabit.

3d. He shall give the greatest attention that no English, American, or other vagabond of any nation shall be able to introduce himself into the savage nations, this intercourse having been proved to be very harmful to the peace of the province, and to the interests of the State, for the idle talk which this kind of people are able to spread abroad easily turns the weak and changeful spirit of the Indians.

4th. The trade with the savages being the item of the most importance after the hunt, we most strictly charge

and prohibit the granting of it exclusively, our intention being that the traders and the Louisiana traders, who are all subject to his Highest Majesty, shall enjoy alternately the advantages of this trade. All favor or preference toward anyone, of these contrary to the rule above set forth, will be very offensive to us, and in order to avoid that, he shall act together, concerning the said matter, with the commandant of Natchitoches, in all that which shall concern the said trade.

5th. He shall not permit that any Louisiana trader shall be equipped to go into the nations, without assuring himself first, by such information as he shall be able to get, of their good conduct and good morals, and then of their departure; he must instruct them in the language which ought to be used among the savages, inclining them always toward peace and good understanding with the Spanish, who provide for their needs.

6th. Whenever he shall have advice from the Government or from the commandants of the posts, of the flight of any malefactor, he shall take prompt measures to capture him.

7th. Upon his arrival at the post he shall take an exact census of the inhabitants of his post, with the number of houses or huts, distinguishing between the white people and those of color, of the two sexes, free or enslaved, crops or products of the earth, manner of living and religion of the inhabitants.

8th. As soon as time will permit him he shall endeavor to arrange all the scattered inhabitants under his orders, either collecting them in form of a village or by picket, as he shall judge most convenient, according to the manner of living of the said individuals, with the precaution, however, of always having at least fifteen huts together for the purpose of preventing insults and violence which any-

one might commit if the huts were to be isolated and in a lonely place.

9th. One of his most important duties shall be that of placing limits to the hunting-grounds, where the inhabitants use no moderation, indiscriminately killing the animals without receiving the least profit from it. The same reasons oblige me to make strictest protection from hunting on horseback or with dogs, from the Missouri river going toward the sources of the Ouachita.

10th. He ought to conform himself entirely to the Book of Instructions here enclosed, in order to decide the affairs of his district, observing that those which shall be of consequence shall be sent to the General Government after the documents shall be in a condition to be definitely judged.

11th. He is charged very particularly to encourage farming by every means possible, being the only means of holding vagrants to their duty.

12th. In order to prevent the disorder which drunkenness occasions in distant places, he shall establish a public house near his residence, which he shall contract every year to the highest bidder, keeping the proceeds in his hands in order to be used in building the church, the house of the curate, and that of the commandant. Protection shall be given to those who hold the public house to trade or sell the drinks at retail.

13th. One of his first duties shall be that of making an exact description, as far as he shall be able, of his district and its environs, which shall be sent to the Government, in which he must impart, without the least hesitation, the discoveries which he is able to make of any description in a country where nature seems to invite man to cultivate the earth.

The management of M. Filhiol; his affability toward

all those generally who shall apply to him; his prudence; the gentleness of his command; the impartiality which he shall manifest in the different transactions, which we expect in advance on his part in order to make the subjects under his jurisdiction happy, in accordance with our desires, will justify the wise choice which we have made in him by carrying out to the letter our wishes as contained in the thirteen above articles.

Given in our house of Government under the seal of our arms and the countersign of our Secretary of New Orleans the first day of February, one thousand seven hundred and eighty-three.

ESTAVAN MIRO.

By order of His Excellency.

ANDRE LOPEZ ARMESTO.

Exhibit B.

Sketch of Ouachita in 1786.

By Jean Filhiol.

[Don Juan, or Jean Filhiol, was captain in the Spanish army and commandante of the post of Ouachita, and stationed at Fort Miro, now Monroe, La., from 1783 until the cession to the United States in 1803.

His grandson, Mr. Hypolite Filhiol, a prominent citizen of Monroe, Ouachita Parish, is a worthy representative of the staunch old commandante. Many of the old commandante's great-grandchildren live in the same parish.]

Ouachita is a region of country in the province of Louisiana, situated west of the St. Louis River, and extending in length from 31½° to 36° north latitude. Its width is a little over thirty leagues.

All traces which are discovered daily, everywhere, show that the people who formerly inhabited it must have been very numerous. No one knows what has become of them, for the oldest persons in the place cannot remember having seen one of them, and if the chiefs of some of the nations had not affirmed that they saw five or six bearing the name of Ouachitas, with the Panis and the Chits, it would be doubted that a people of that name had existed. Some French having settled there, before the massacre of the Natchez, doubtless abandoned the place at that period. The prairies Vilmont, Dumanoir, De Le, and De Siard still retain the names of their ancient owners, and the remains of these settlements can yet be seen.

Owing to its extent, this region cannot be other than

varied, both in climate and in soil. I have drawn up a sort of chart, which I will add to this, to give an idea of the position of the place, and I will follow it, in order to give a more exact description, commencing with that portion most adjacent to the capital.

This region is watered by a river of the same name, which flows through the center from one end to the other, after having received the waters of many bayous in its course. It empties into Red River about nine leagues from the junction of that river with the St. Louis (Mississippi) River.

The lower part of the Ouachita River, from the point where the Tensca and the Cataoulou join it until it empties into Red River, a distance of about twenty-two leagues, is called Black River. I do not know why this short space bears another name. I presume that it is owing to the color given to the water by its muddy, grassy bottom and its depth. That of Red River is reddish, and that of the Ouachita, which flows over white sand, is most clear. There are very slight foundations for the origin of most of the names.

All this portion is uninhabitable, in the east, so far as the St. Louis River, and in the west as far as the vicinity of the Cataoulou, because it is all overflowed when the river rises, and one could scarcely find enough land on which to encamp. The river is elsewhere healthy and without obstruction and at all seasons deep enough for a vessel of 400 tons to sail in it. Its banks abound in cane. When the water does not rise until the end of winter, it is there that the neighboring savages make the greater part of their bear's oil. The Bayou Tensca empties into the Ouachita River on the eastern coast, where Black River commences to take its name. This bayou rises in some lakes about fifty leagues higher. On the right side of

this bayou, about twelve leagues toward the east-northeast, we find the Bayou d'Argent, through which, following the same points of the compass, one would reach the main (St. Louis) river, a little above and in sight of Natchez.

Three leagues higher than the point where the Bayou d'Argent empties into the Tensca, on the left side we find the Bayou Mason, which empties there also. This bayou rises in some lakes about twelve or fifteen leagues below Arkansas and follows the course of the Tensca until they unite. These two bayous are not navigable except during high water. They seem to receive their waters from the (St. Louis) river, which connects with them through the lakes. During low water one can use a small pirogue as far as the mouth of the Bayou d'Argent, but from there until opposite Natchez it is necessary to take a carriage. The banks of Bayou Tensca, like those east of Bayou Mason, are low and scarcely habitable. West of this bayou there is some land which is very fine, though isolated. It is near the junction of Bayou Mason with Bayou Tensca, and extends to the Bayou des Courrois. I will speak of it in its place. To the left and opposite the mouth of the Tensca is the Cataoula. This is a bayou which connects with a sort of lake of the same name, which is fifteen or sixteen leagues from its mouth. This lake is six or seven leagues in circumference, and is formed only by the drainage from the neighboring hills. When the waters are low this lake becomes a prairie. There are no other waters except a small bayou in the center, which, I believe, is a branch of Bayou de'Arclon. The north and west of this lake are bounded by hills, covered with pine trees, and extend in the same direction as far as Rapides.

About six leagues above the junction of the Cataoulou

and Tensca with the Ouachita River, on the left side, is the Bayou Bachalai which is nothing but a branch of the Ouachita. During high water the Ouachita embraces the Bataoulou Lake, which is five or six leagues distant. The hills of Ouachita start near this bayou, on the western coast of the river, toward which they alternately approach and recede, their chain extending to its source.

A little above Bayou Bachalai, on the east, is the Prairie Vilmont, which overflows like all the land, as far as Bayou Louis.

Bayou Louis is about two leagues above Prairie Vilmont. It rises in Bayou Mason and empties through two branches, into the Ouachita and the Tensca. Bœuf River is two leagues higher than Bayou Louis, on the same side. About twenty leagues from its opening into the Ouachita it receives the Bayou des Courrois, as it flows from Bayou Mason. On this side of the Bayou des Courrois, between Bayou Mason and Bœuf River, are those habitable lands which I mentioned when speaking of Bayou Mason. Bayou Louis passes through their center. These lands are high and said to be excellent, susceptible of employing 200 inhabitants. It is a pity that during high water they are completely isolated so that no conveyance can approach, except at a distance, through the surrounding swamps, which, during low water, are almost dry. Bœuf River rises near Bayou Bartholomew, and would be a great help to the back lands east of the Ouachita, if the swamps which border it from its source, did not, during high water, render the landing of boats very difficult. During low water even a light pirogue could not navigate it.

About twelve or fifteen leagues from Bœuf River, the high lands of the Ouachita begin, which should be cultivated, as much for the quality of the soil as because they

do not overflow. These lands commence in the west at the Prairie des Cotes, and in the east at Prairie de Le, and extend a little beyond the sources of the Ouachita River. Those which appear to me most suitable for cultivation are from the above-mentioned places, as far as the Mound Prairie, and all along Bayou Bartholomew, almost to the Arkansas line. This would form an extent of land nearly fifty leagues in a straight line, and with uninterrupted communication by land. I do not pretend to say that the higher lands would be uninhabitable, but only that they do not compare with the lower ones, because they are more irregular, being cut up by hills which are mostly covered with pine trees, and they have not the same advantages of easy navigation.

I will pause, then, at the first, which merit the most attention. The number of prairies described in the plan which are there east of the river do not appear natural to me. Their products and the remains discovered on them cause me to think them the old clearings of the ancient inhabitants, who, in the course of time, had learned to choose their lands. They are all one could desire, and, in fact nothing is lacking but laborers.

Although there are no prairies west of the river, the soil does not seem inferior, and, where the hills do not reach the water's edge, the land is level and well wooded. Level pine woods are very common, and there are cane fields everywhere. This guarantees pasturage at all seasons of the year. From the bayous, shown in the same plan, belonging to the above described parts, it is easy to judge that these lands do not lack water. I have omitted several of them, which are nothing more than drains for the hills. Those which bear a name are navigable during high water; that is, several months of the year, and would greatly facilitate the labors of any inhabitants who might settle in the surrounding depths.

The soil is light, deep and spongy, having a surface of a foot or eighteen inches of black earth. Below that it is yellow and red and absorbs water very rapidly. A plowed field can be worked in the morning, after a heavy rainfall during the night, and the ground retains the moisture to within four inches of the surface after a drought of two or three months in summer. Corn, rice, potatoes, pumpkins, and all garden products grow very well, and I have sowed wheat for the past two years and succeeded admirably with it. Tobacco does well there, also, and is of a superior quality. Cotton and indigo do equally well, but no one has yet tried to make anything out of the latter.

Among the plants one finds agrimony, angelica, elecampane, mugwort, restharrow, burdock large and small, tree moss, aromatic herbs of all kinds, crane's bill, maiden's hair, chervil, thistle, coraline, century plant, cassia, sweet and bitter tarragon, male and female ferns, strawberry plants, fumiter, ginger, marshmallow, bitterwort, ginseng, holly, leadwort, hedge mustard, ipecac, wild indigo whose root never dies, lily of the valley, melilet, St. John's wort, monk's hood, water lily, kingfern, pellitory, dandelion, plantain, polypod, pedicularis, blood root, dragon's blood, rag wort, knee grass, self-heal, Virginia creeper, wild valerian, veronica, vervain, golden rod, cat mint, wild and sweet clover, etc. The principal woods are the oak, gum, walnut, pine, and sassafras trees.

The ash, the elm, the mulberry, the acacia, the cottonwood, the willow, the wild pecan, the wild olive, the linden, the beech, the birch, the holly, the arrow tree, which has the exact appearance of the Peruvian bark, the elder, the beam tree, the persimmon, the plum and the sumach trees, are common there. There are regions of wax trees in the highlands, which produce them. Toward the

Missouri apple trees are found, whose fruit is very good, and there are many cedars above the falls. The wild grape vine is abundant, and higher up there are grapes which compare favorably with those which are imported.

In the woods there are the tiger, the tiger cat, the bush cat, the wolf, the fox, the field rat, the wild cat, the pole cat, the rabbit, and the squirrel. Bears are numerous, also the buffalo and deer. The buffalo is not common in the low lands, as it has been so much hunted there, but it abounds above the falls. There are otters and beavers in the swamps and along the whole length of the bayous and of the river. There would be more beavers killed if the hunters could make more use of their flesh. Turkeys are plentiful, as are also swans, cranes, geese, bustards, and ducks during six months of the year. Wild pigeons pass in flocks and do great damage to the acorns. All the water fowls and others known in this region are found there in their different seasons.

The cypress swamps do not connect with each other as they do near the main (St. Louis) river, but are far apart in the low grounds where the water collects. There are few of them which do not empty into the river through the bayous. They are everywhere, as far as the Bayou de l'Eau Froide, which is a little higher than the Missouri, and they can be found near all the habitable lands.

The mountains which commence west of the Lower Ouachita continue without interruption and gradually grow larger until they become very high. There are very few in the east besides some hills, except above the falls, where they are the same as on the opposite coast, and east of the Bayou Saline, which unites them with those above the falls.

There is no doubt that these mountains contain many minerals of different kinds. The cracking of the rocks

is often heard, and when repeated by the surrounding echoes cannot fail to excite the attention of any one in the vicinity. To judge from the appearance of the minerals which have been seen on the surface of the cracks, these mines must contain gold, silver, copper, lead, iron, alum, vitriol, sulphur, etc. I find that the greater part of these mines are from the Missouri to the forks of the Ouachita. Above the Glaise à Paul superior rock crystal is found, and not very far distant are coal mines and slate quarries. These mines would be very easy to work owing to the facility of navigation in their vicinity through the river and bayous, which are practicable in certain seasons. There are three places known where salt is made—one in the Ouachita, the other at Bayou Saline, and the third towards the Missouri.

I will now resume my remarks about the Ouachita River, where I paused to speak of the lands.

It is not navigable for large vessels at all seasons, except as far as Bœuf River. In low water further passage is prevented by a chain ol rocks, which, with a small amount of labor, could be levelled, and one could sail as far as Mound Prairie. In low water the smaller vessels can go up as far as the Rock Bar above Bayou Bartholomew (an inestimable advantage which I omitted to mention when speaking of the most suitable lands for cultivation). In high water a loaded boat with thirty oarsmen could go as far as the falls. The bed of the river averages two and one-half to three acres in width, with a bottom of sand and gravel. The water is clear and healthy and has a good taste. There are no obstacles, so that navigation is easy, and without the least danger until above Bayou Bartholomew, as snags are very rare there, and the current, which is never very strong, causes little caving of the river banks.

There are no other lakes deserving the name, unless it be those at the head of Bayous Tensca and Mason.

The fish which are most plentiful are the swordfish, the catfish, the carps, and the sheephead. There are also the sturgeon, pike, barfish, perch, trout, gudgeon, cardine, eel, and others. Turtles are very common, and crocodiles, which last show themselves above Black River and are rare towards the settlement.

Twenty leagues above Bayou Bartholomew, and on the same side, the Bayou Saline empties into the river. It flows from the north-northeast after a course of more than 100 leagues, between the Arkansas and Ouachita rivers. Like the others, this bayou is navigable after heavy rains. Its right and left banks are high lands as far as the Ouachita, and by the Arkansas River. The lands towards the Ouachita are fine, although interspersed with hills. The other hills are very steep and rugged.

The little Missouri River is about forty-five leagues higher on the western coast. It flows from the north-northwest and rises in the mountains which separate that part from the Red River region. The village of Grands Cadeaux is about thirty-six leagues west of its mouth. The river, like the rest of the Ouachita and the bayous bearing names and shown in the plan, is not navigable except after heavy rains, which cause a rise. These rises are quite frequent from October to April, and haste is made to profit by them, for the rise of the water is very rapid and its fall proportionately quick, especially that part caused by the drainage of the mountains.

The falls of the Ouachita are about thirty leagues higher than the Missouri.

There is a ledge of rocks which obstructs the river and forms an uneven levee, 3, 6, and 12 feet in height, over which the water rushes. There is only one passage through which we could draw the smallest conveyance.

When the water rises, above and below, this levee becomes perfectly level, and large vehicles descend without any danger, as the water passes 10, 15, and 20 feet beyond the rocks. Above the falls the river is wide and shallow up to the end, and strewed here and there with large rocks, which render navigation very dangerous. During low water one can make short journeys with small crafts, with very little danger.

The Hot Springs are in a small bayou, which empties into the river on the right, about 10 leagues above the falls. The water starts from a rock boiling hot, but becomes modified as it flows and joins the waters of extremely cold springs. These waters are as clear as crystal. The warm water has a taste of sulphur. (have withdrawn the last sentence.)

The three forks which compose the river unite about 30 leagues above the springs. The western one is the most important. Some Cadaux (natives) going to the settlement of the Osages (natives) declare that they crossed it in the large prairies. The whites who traveled on it say that they have never seen its end and that it is very navigable wherever they have been. The southern fork is less practicable and the northern one scarcely so.

This vast extent of country is inhabited by 200 persons, who, altogether, supply only seventy-four men capable of bearing arms, after the census of the present year 1788. These men are composed of the scum of all nations. Several are fugitives from their native country, and like the others, are established there by their love of idleness and liberty and perhaps also to escape the pursuit of justice, before anyone should be placed in authority.

Their manners and customs correspond with their origin. They hardly know whether they are Christians. They excel in all vices, and their mode of life is really shameful.

Even the savages, who have seen them, regard them with contempt. They are always ready to rebel against the least thing which is not according to their idea, but they trouble themselves very little about anything. Their gun and powder horn are all they care for, and all countries are alike to them. The women are as unworthy as the men, and are suitable companions for their husbands. What models for their posterity! They are lazy in the highest degree, no matter what their undertaking. If they hunt a little it is only to satisfy the demands of nature. During the six years that I have been here I have tried everything that charity and my imagination could suggest to excite the ambition of these miserable creatures and cause them to recognize their real condition, but I have not succeeded. I have tried in vain to collect them together in the town or on the coast, and show them how grateful they should feel in this new position, hoping by having them near at hand, to lead them more easily, by advice or example, to a more friendly life. However, twenty-five of them started at last to cultivate the ground, but there are scarcely six among them who cleared enough to make a living, which should have required little effort, as a very small amount of food satisfies them. Several others started to work but very soon abandoned it.

They say, in defence, that they cannot work while starving, and that they have nothing to live on while they are making their crops. This reason would vindicate them if their extreme dislike for work did not prevent one believing this the only cause of their idleness.

The whole commerce of the country does not exceed annually 6,000 to 7,000 jars of bear's oil, 2,000 deer skins, 2,000 pounds of tallow, 500 pounds of beavers and 100 otters. What a difference there would be if the same number of

men were real workers! The hogs alone which they could raise, considering how easy it is, would supply more than that by their fat alone, independent of the provisions which they could raise. Wanderers and vagabonds as these unhappy creatures are, they should cherish their firesides and take an interest in the community of which they regard themselves as members. They should improve their customs and should offer a better example to their descendants.

This is all the imformation which my zeal could gather about Ouachita, to fill the order for it, which I received about the date 27th July, 1786. I have done all that I could to render it exact. My plan is not drawn with the accuracy of a geographer, though I have observed the points of the compass therein as much as was possible, but I believe it is sufficient to give an idea of the position of the locality, and I had no other object in view. I close my description by the idea which occurs to me regarding this plan, and which I take the liberty of annexing here.

This region of country is difficult of access from the coast of the (St. Louis) river, from the mouth of Red River as far as Arkansas, because of the marshy lands and swamps one encounters; and higher up between the Bayou Saline and the Arkansas River, on account of a chain of mountains among which the passes are rare, and above the falls entirely impassable from the quality and quantity of the rocks with which they are covered.

It can contain a considerable population, which would find there, without the aid of the Government, all that would be neccessary for its protection against the enemies of the State, and could even furnish help to the capital.

This population would defend Mexico against the enemies on the other side of the (St. Louis) river, and would

be the nearest to assist the stations of the Natchez and Arkansas.

Communication between this settlement and that of the Natchitoches and Rapide, need never know interruption for a single season.—[The Sunday States, New Orleans, Sunday, August 18, 1889.]

Exhibit C.

Don Juan Filhiol's Sword. Early Ouachita History.

Our fellow-townsman, Hypolite Filhiol, is making preparations to present to the parish of Ouachita the sword borne during his lifetime by his distinguished grandfather. This interesting relic will he provided with a handsome case, and occupy a conspicuous position in the district court room of our new court house. A more fitting repository for this memento of the old commandant could not be found.

The early history of Ouachita Parish, and of the entire Ouachita Valley, is bound up with the life of Don Juan Filhiol. He found it a wilderness, peopled by savage Indians, only less savage *coureurs de bois*, and wild beasts. He left it with civilization firmly planted within its borders. No bloody wars, no midnight massacres by savage foes marked the mild reign of this wise and benevolent man. We call it a reign, and such in truth it was. Far removed from the central power in the province the commandant of the Ouachita post was, by the necessities of the case, clothed with almost unlimited authority, and was continually called upon to exercise a discretion which, in the hands of an unscrupulous or less able man, would have involved the infant colony in ruin.

Don Juan Filhiol was of French origin, but like many young gentlemen of his generation sought service in a foreign country. He entered the armies of Spain, where he attained the rank of captain. Making his way to Louisiana he was appointed commandant of the Ouachita

post by the then Governor-General, Don Estevan Miro. Under instructions from Miro he embarked at New Orleans with his family in a small bateau, in February, of the year 1783, to take charge of his government. The territory under his jurisdiction was very extensive, but not of well-defined limits. It included all that is now known as North Louisiana and South Arkansas. The white population at that period did not exceed two hundred, while the Indian tribes were numerous, warlike and as treacherous as any in America.

The difficulties of his trust can be more easily imagined than described. Yet, by the wisdom of his conduct and the justice of his rule, he gained the confidence of the savage and the affectionate esteem of the white man. To these more than to any other facts is to be ascribed the singular exemption of the Ouachita country from Indian massacres. How agreeable the contrast with the first settlement of Kentucky, "the dark and bloody ground," whither Boone had just led his pioneers.

Don Juan proceeded up the Ouachita river as high as *Ecore a Fabry*, now Camden, Arkansas. From this point he made reconnoissances throughout South Arkansas, and in one of these his men discovered the wonderful Hot Springs. Upon his report of his discoveries to the governor, he was advised by his friends and the officials in New Orleans to make application for a grant of the springs. This he did in the year 1787, and Miro made him a grant of one league square, with the springs in the center—as valid a Spanish grant as ever the United States Government confirmed—but which profited nothing the object of it, nor his heirs, who have made unceasing but unsuccessful efforts to have their rights recognized. It may not be uninteresting to know that Don Juan set a value of $1,500 on his property, now worth well up in the millions.

His mission in South Arkansas, one of discovery, having been accomplished, Don Juan retraced his course down the Ouachita to Prairie des Canots, where now stands the city of Monroe. Here he fixed permanently the post of Ouachita. In 1786 he erected Fort Miro, an interesting account of the building, of which exists in the commandant's handwriting among the old papers in the recorder's office. It was a palisade of heavy oak timbers, eight feet high, inclosing the commandant's residence and grounds in what is now the court-house square. This fort was built on the petition of the residents of the post who had become alarmed at the murders committed by the Indians in a neighboring jurisdiction—that of the Arkansas. But their fears proved groundless, as we have no record of an interruption of the peace between the whites and Indians.

About the year 1800 Don Juan resigned his office of commandant and was succeeded therein by Don Vincent Primemdez Texario, who, we believe, held office until the change of government.

Don Juan had received a grant from the Spanish government of ten arpents front on the Ouachita river by a depth of forty arpents. Prior to the year 1816, he had laid off a town on the front of his grant, extending as far back as the east side of Jackson street. He named it Fort Miro, and made liberal offers of ground for public and school uses. These offers do not appear to have been accepted by the police jury until September 5, 1816. At that date the seat of justice for the parish was permanently located at Fort Miro. Previously it had been shifted from one point to another, Prairie Mer Rogue being the most formidable rival of the infant capital.

Don Juan Filhiol died in the year 1821. Two children survived him, Edmund Landry Grammont, father of

Messrs. Hypolite Filhiol, and J. B. Filhiol, and a daughter, Marie Barbe, grandmother of Mrs. Julia Dabbs. His grandsons are in possession of some very interesting papers pertaining to the early history of this country, and, no doubt, as soon as a permanent public library can be established they will contribute the originals or copies to enrich its treasures. Everything relating to this remarkable man is of interest to the people of Ouachita. The sword to be presented to the parish he received from the governor as a mark of his appreciation of his valuable services.—(*The Monroe Bulletin*, Monroe, La., March 26, 1884.)

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS in error,
v.
CHARLES E. MAURICE, CHARLES G. CONVERS, and WILLIAM G. MAURICE.
No. 236.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

STATEMENT.

This is an action of ejectment instituted in the United States circuit court for the eastern district of Arkansas for the recovery of a certain tract of land in the city of Hot Springs, Garland County, Ark., situated on the permanent reservation at said Hot Springs, known as Bath House Site No. 8, together with certain sums as rent therefor. The action is based upon a certain alleged grant to the plaintiffs' ancestor, Don Juan Filhiol, made on February 22, 1788, by the then Spanish governor of the province of Louisiana, through whom the plaintiffs claim as heirs at law.

The defendants in error demurred to the declaration upon the ground that said declaration did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and the plaintiffs electing to stand upon their declaration, and refusing to amend, the action was dismissed. From this decision and judgment of the court below the plaintiffs sued out a writ of error to this court.

No opinion was delivered by the court below, although the demurrer was sustained upon the same grounds as was stated in the opinion of the court in the case of *Muse* v. *The Arlington Hotel Company* (68 Fed. Rep., 637), which was a case precisely identical with the case at bar, being an action of ejectment brought by the heirs at law of said Don Juan Filhiol to recover the tract of land on the Hot Springs Reservation on which the Arlington Hotel is situated, and claiming title thereto under the same alleged Spanish grant which is made the basis of title in the action at bar.

In the case of *Muse* v. *Arlington Hotel Company*, however, there were exceptions filed by the defendants to the muniments of title and other exhibits set up in the declaration, as required by the statute of the State of Arkansas in such cases made and provided (Sand. & H. Dig., sec. 2578), and under these exceptions the court in rendering its decision was required to and did go very largely into matters of evidence pertaining to the validity of the plaintiff's title, the object of the Arkansas statute being not only to prevent surprise,

but also to prevent, as far as may be, the discussion of questions of evidence during the trial, so that trials may be rendered more expeditious and the attention of juries not diverted from their exclusive province. But in the case at bar the record does not disclose that any exceptions were filed before the trial to the muniments of title and other exhibits set up in the declaration as required by the Arkansas statute, and hence we shall confine ourselves to ques ions of law and fact properly presented by the pleadings, by prior decisions of this court concerning the same subject-matter, and by those permanent and general laws of which this court will take judicial cognizance.

JURISDICTION.

Before reaching any discussion of the questions arising upon the writ of error in this case, the all-important question of the jurisdiction of this court to maintain the writ is first presented.

It seems clear that no cause of action is stated in the declaration at bar which will admit of a review of the decision of the circuit court of the United States for the eastern district of Arkansas upon a writ of error sued out directly from this court to that. Writs of error may be sued out directly from this court to the circuit courts in cases, among others, in which the construction or application of the Constitution of the United States is involved, or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. (26 Stats., 826.) But a case can only

be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is granted under that instrument in such wise as that a definite issue in respect to the possession of the right can be distinctly deducible from the record; otherwise the judgment of the court below can not be revised on the ground of error in the disposal of such a claim by its decision. (*Muse* v. *Arlington Hotel Company*, 168 U. S., at p. 435; *Green* v. *Cornell*, 163 U. S, at p. 78.) The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to *require* the circuit court to pass on the question of validity or construction in disposing of the right asserted. (*Bourgmeyer* v. *Idler*, 159 U. S., 408; *Muse* v. *Arlington Hotel Company*, 168 U. S., 430–435.) It is settled that in order to give the circuit court jurisdiction of any cause arising under the constitution or laws of the United States or treaties made or which shall be made under their authority the cause of action must appear from the plaintiff's own statement of his claim. (*Muse* v. *Arlington Hotel Company*, 168 U. S., at p. 436, and cases cited.)

Turning now to the declaration of the plaintiffs, we find, first, that it is not even alleged in the body of the declaration that the parties plaintiff and defendant are citizens of different States. There is an inferential statement to this effect in the caption of the complaint, wherein certain parties plaintiffs are described as resi-

dents of various States, but there is no allegation of diverse citizenship in the body of the complaint itself; second, the only allegation in the declaration touching the jurisdictional question at issue is as follows (Transcript, p. 8):

> And for cause of action say that by the fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France which was ratified on the 21st day of October, 1803, the *United States* undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty and without due process of law and in violation of the fifth amendment of the Constitution of the United States, *defendants* (i. e., Charles E. Maurice, Charles G. Convers, and William G. Maurice) did without condemnation and without compensation to the plaintiffs on or about the 2d day of January, 1897, wrongfully and without right oust the plaintiffs from the possession of the land in controversy, etc.

Either this is an action against private individuals or else it is an action against the United States It is insisted by the claimants that it is an action wholly against private individuals and in no wise an action against the United States, and is ruled by the decision of this court in *United States* v. *Lee* (106 U. S., 196). If this contention be taken to be true, then manifestly there is not drawn in question by this action any

right, title, privilege, or immunity under the Constitution of the United States, nor the validity or construction of any treaty made by the United States. No such right is alleged in the petition, nor was any such question required to be determined by the decision of the circuit court, nor was any such question actually determined by the decision of the said court. Upon this theory the case is purely an action of ejectment between private individuals. Individual defendants were not inhibited by the fifth amendment of the Constitution from taking private property for public uses without compensation, and the petition utterly fails to allege any duty on the part of the individual defendants in and about the Constitutional or treaty rights relied upon. The circuit court held that the plaintiffs' title failed because of noncompliance with the Spanish law. It is not pretended that the treaty, the validity of which confessedly was not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the circuit court to determine into what category the alleged claim fell. In doing so the construction of the treaty was not in any wise drawn in question. Even if it be assumed that for the sustaining of the demurrer the court below held that the claim was barred by the act of June 11, 1870, that would only be a matter of construction, and the constitutionality of the act, if held to apply to the claim rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the circuit court was invoked upon the question. All these

matters could and would have been considered upon proper presentation to the circuit court of appeals, and the decision of that court would have been final under the sixth section of the act of March 3, 1891 (26 Stats., 826). The case presents, therefore, precisely the same jurisdictional question as was before this court in *Muse* v. *Arlington Hotel Company* (*supra*), and is disposed of by that decision. The only way in which the case at bar can be considered as involving the construction or application of the Constitution of the United States or the validity of any treaty made by the United States is to regard the action as an action against the United States, and the allegations of the plaintiffs' petition, as set forth on page 8 of the transcript, as being addressed to a duty which the United States owed to them. If the case be so considered, it is still without the jurisdiction of this court, for the reason that the United States can not be sued except by its own consent, and no such consent is here alleged or shown; it, indeed, can only be shown by an act of Congress passed for that purpose. (*Carr* v. *United States*, 98 U. S., 433; *United States* v. *Lee*, 106 U. S., 196; *Tindal* v. *Westley*, 167 U. S., 204; *Stanly* v. *Schwalby*, 147 U. S., 508–518.) Nor can this result be obtained by so framing the action as to nominally present a case against private persons only, yet really to result in passing upon the property rights of the United States. As was said by Mr. Chief Justice Fuller in *Stanly* v. *Schwalby* (*supra*):

> Whenever it can be clearly seen that the State is an indispensable party, to enable a

court * * * to grant the relief sought, it will refuse to take jurisdiction. (*United States* v. *Lee*, distinguished.)

GENERAL ARGUMENT.

Aside from the jurisdictional issue, it is submitted that the judgment of the court below, sustaining the defendants' demurrer and dismissing the plaintiffs' petition, was clearly right, for the following reasons:

1. The declaration and exhibits do not allege or show legal title to the land in controversy in the plaintiffs or the ancestor through whom they claim.

2. No land is described in the declaration or exhibits which is capable of verification or which is capable of identification with the demanded premises.

3. The declaration does not allege possession of the demanded premises in the claimants or the ancestor through whom they claim.

4. The declaration does not allege or show any right of possession of the demanded premises in the plaintiffs or the ancestor through whom they claim.

5. The published decisions of this court and the public laws of the United States, of which this court will take judicial cognizance, show that the legal title to the demanded premises, as well as the possession and right of possession of said demanded premises, is outstanding in another.

6. The claimants are estopped by their acts and conduct from maintaining this action.

I.

The declaration and exhibits do not allege or show legal title to the land in controversy in the plaintiffs or the ancestor through whom they claim.

It is thoroughly well settled that a plaintiff in ejectment, where the defendant is in possession, must show a valid legal title, and not merely an equitable one, to authorize recovery. When no such title is shown, the defendant's possession is sufficient for his protection. (*Moorehouse* v. *Phelps*, 21 How., 294.)

In a court of the United States actions for the recovery of land can be maintained only upon a legal title, not upon an incipient equity, even if the latter might have sustained the action under State statutes in courts of the State in which the Federal court is sitting. (*Sheirburn* v. *De Cordova*, 24 How., 423; *Swayze* v. *Burke*, 12 Pet., 11; *Fenn* v. *Holmes*, 21 How., 481; *Hooper* v. *Scheimer*, 23 How., 235; *Smith* v. *McCann*, 24 How., 398; *Oaksmith* v. *Johnson*, 92 U. S., 343; *Langdon* v. *Sherwood*, 124 U. S., 74; *Redfield* v. *Parks*, 132 U. S., 239.)

In the courts of the United States the distinction between legal and equitable rights and remedies is strictly maintained and rigidly enforced, albeit sitting in States where such rights and remedies have been amalgamated by statutes. Equitable interests can be maintained, not in an action of ejectment, but in an equitable proceeding only, where they can properly be investigated with a due regard to the rights of others which may have intervened. (*Carpentier* v. *Montgomery*,

13 Wall., 480.) Thus in *Loring* v. *Palmer* (118 U. S., 321) it was held that where the interest of the *cestui que trust* was not created by the deed to the trustee, but by the original contract of purchase in connection with certain contemporaneous correspondence, the legal title did not vest in the *cestui que trust* by virtue of the statute of Michigan abolishing passive trusts, but that he merely took an equitable title, and hence his remedy was in a court of equity and not by action of ejectment.

By the statute of Arkansas (Sand. & H. Dig., sec. 2578) the pleadings in an action of ejectment are very nearly assimilated to those of a suit in equity to quiet title. The pleading is special and not general. In his declaration the plaintiff is required to set forth "all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as the same can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy." This provision of the Arkansas statute, however, is binding upon the Federal court only in so far as it affects the procedure, the practice, and the pleadings in an action of ejectment. Even if the Arkansas statute undertook (which it does not) to permit a plaintiff in ejectment to recover upon proof of an equitable title, such State law would be binding only upon the State courts and would have no force in the circuit courts of the Union (*Hooper* v. *Scheimer*, 23 How., 235), in which said courts the plaintiff can only recover upon proof of the legal title.

But the Arkansas statute of course does regulate the procedure and practice and pleading in the circuit courts of the United States for that district, and hence under this statute if the documents under which the plaintiff claims title do not show upon their face the existence of the legal title to the land in the plaintiff then the declaration should be dismissed upon demurrer, and in considering the demurrer the court is to consider not only the allegations in the declaration, but likewise the legal effect of all the exhibits filed in connection with the declaration. (*Fagg* v. *Martin*, 53 Ark., 453.)

Bearing in mind these well-settled principles, we proceed to an examination of the declaration and exhibits in the action at bar.

The plaintiffs ground their right to recover upon an alleged grant to Don Juan Filhiol by Miro, governor-general of the province of Louisiana, bearing date February 22, 1788 (Transcript, p. 4), which said grant was made in obedience to a memorial of said Filhiol to said Miro on December 12, 1787, and in conformity with an alleged figurative or conjectural survey made by Carlos Trudeau, the surveyor-general of the province, by direction of the said governor.

There is also set up in the declaration an alleged deed of cession or grant from the said Don Juan Filhiol to his son-in-law, Narcisso Bourgeat, and a deed of retrocession or reconveyance of the same land from said Narcisso Bourgeat back to said Don Juan Filhiol. (Transcript, pp. 5, 6, and 7.) It is, however, entirely unnecessary to notice this conveyance from

Filhiol to Bourgeat and from Bourgeat back to Filhiol. The stream can rise no higher than its source. Of course, if Filhiol had no title to convey he could convey none to Bourgeat, and under the deed of reconveyance from Bourgeat he could not possibly take any greater or different estate than that which he held under the original Spanish grant.

It is argued by the plaintiffs in error that this deed of cession, made in November, 1803, before Texier, military and civil commandant of the district, and the deed of retrocession, made in July, 1806, before Poidras, the judge of the court of Pointe Coupee, had the effect of establishing the legality of the original grant from the governor-general to Filhiol, because, by the regulations of Morales, the controller and intendent of the province of Louisiana, in whom at the date in question (November 25, 1803), the power to grant lands had been vested by the King by royal order of October 22, 1798, notaries public in New Orleans and commandants of posts were forbidden to take acknowledgments of conveyances of land obtained by cession unless the seller or grantor presented and submitted the title which he had obtained, and he was required to insert in the deed the metes and bounds and other descriptions which resulted from the title. It is therefore argued that since these officers must be presumed to have performed their duty under these requirements, hence Filhiol must have presented his title under the original grant to Texier at the time of his sale of the land to Bourgeat, and that the same were examined and approved by said Texier, and that among the documents of title so presented it

must be presumed that the survey of Trudeau was included, which, in turn, it is argued, must be held to prove that said Trudeau had actually made a survey of the land at that time, to wit, in 1803.

There are many answers to this contention. In the first place, the regulations of O'Reilly require that such survey must have been made "at the same time" at which the grant was made, and to prove that a survey was made in 1803 is not sufficient to establish a grant alleged to have been made by the governor-general in 1788, which not only does not mention any such survey, but on the contrary, expressly refers to a survey to be made.

In the second place, the regulations of Morales relied upon requires that the acknowledging officer shall be careful to insert in the deed the metes and bounds and other descriptions which resulted from the title. Now, turning to this deed of cession, made by Filhiol to Bourgeat, in 1803, we find it described as a tract of land with a front of 84 arpents and a depth of 42 arpents on each side of the stream called *La Source d'eau Chaude*, about 2 leagues distance from its entrance into Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bound on both sides by lands belonging to the Crown. This description utterly fails to meet the requirements of Morales by inserting in the deed the metes and bounds and other descriptions resulting from the title; and it negatives the idea that the scrivener who drew the deed had before him any survey of the land conveyed. There is no description

here by metes and bounds, and it would be impossible for any surveyor to actually locate the land in question from the description given.

In the third place, the notaries public and other officers before whom deeds could be acknowledged, under the regulations of Morales, are not given any judicial power to pass upon the validity of any title submitted to them by a person desiring to convey the same, and even if they were of opinion that the proof submitted showed title in the grantor yet that opinion can not be binding upon the judiciary when the title is subsequently called into question by an action at law against strangers.

The deed of cession from Filhiol to Bourgeat and the deed of retrocession from Bourgeat to Filhiol therefore may safely be eliminated from this case. The plaintiffs' title, if it exists at all, must be derived from the original deed of grant to Filhiol by the governor-general, Miro, and the validity of such grant, in turn, depends upon whether it conformed to the royal orders of the King of Spain relative to the making of such grants which had the force and effect of what with us is known as statute law, and without compliance with which no valid grant could be made by the governor-general.

At the time that this alleged grant was made the regulations of Governor O'Reilly, dated February 18, 1770, were in full force in the province of Louisiana, the twelfth section of which said regulations was as follows:

> All grants shall be made in the name of the King by the governor-general of the province, who will *at the same time* appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the process verbal which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the governor, another shall be directed to the governor-general, and a third to the proprietor to be annexed to the title of his grant.
>
> (See 5 Am. St. Papers, 289–290. *United States* v. *Boisdore*, 11 How., 76.)

These regulations were approved by the royal order of the King of Spain of August 24, 1770, after which they had the force of statutes which no official had the right to disregard. (*United States* v. *More*, 12 How., 209–218.)

A royal order of the 24th of August, 1770, states that O'Reilly had communicated the regulations made by him to his Government, and these declaring that the granting of lands had been confided by His Majesty to the governor and *comisario ordenader*, he considered it would be better in future that the governor alone should be authorized by His Majesty to make those grants. The order to the governor then proceeds: "The King having examined these dispositions and propositions of the said lieutenant-general, approves them, and also that it should be you and your successors in

that government only who are to have the right to distribute the royal lands, *conforming in all points as long as His Majesty does not otherwise dispose to the said instructions, the date of which is the 18th of February of this present year.* (See 12 How., at p. 218.)

The title to the public lands in the Territory of Louisiana was of course in the King of Spain. This title could only be obtained by grant, either from the King himself or else from the precise person designated by the King for that purpose, to wit, the governor-general, and in the precise manner provided by the King. By the regulations of O'Reilly the following essential things were required to be done: First, at the time of making the concession the governor must appoint a surveyor to fix the bounds of the land; second, the judge ordinary of the district and two adjoining settlers must be present when the survey is made; third, these four persons should make out a process verbal or detailed statement of the survey; fourth, the surveyor must make three copies of this survey; fifth, one copy of the surveyor's survey must be deposited in the office of the scrivener or clerk or secretary of the governor; sixth, a like copy must be sent to the governor-general; seventh, a third copy must be delivered to the claimant or proprietor and by him attached or annexed to the title of his grant.

The complaint in the present action and the exhibits filed in support thereof wholly fail to allege or show that any of these essential prerequisites of a valid grant were done or performed, and hence the declaration of the plaintiffs and the exhibits thereto attached

wholly fail to allege or show that the plaintiffs' ancestor ever had legal title to the demanded premises.

In *White* v. *United States* (1 Wall., 680–687) it was said that the Spaniards were a formal people, and their officials were usually careful in the administration of their public affairs. It will not do to say, as is argued on behalf of the plaintiffs in error, that these regulations of O'Reilly were merely forms by him prescribed for the regulation of grants of the royal lands, and that they were binding only upon himself and might be departed from by his successors in office. These regulations of O'Reilly's were submitted to the King, and by him sanctioned and approved, and by his royal proclamation it was expressly stipulated that while in the future he would designate the governor-general as his royal representative in the dispensation of his favor by the grants of public lands within his domain, yet in acting as his agents for this purpose he expressly directed that they and their successors should conform in all respects to the instructions and regulations of O'Reilly's, which His Majesty had sanctioned and promulgated. An attempted grant, therefore, by the governor-general, which did not in all respects conform to these rules and regulations, would be void and would convey no right, title, or interest to the grantee. It would be just as ineffectual for this purpose as would be the issuance of a patent by the Commissioner of the General Land Office for public lands of the United States which were not open to preemption, settlement, or sale. Such an instrument would be void upon its face, would convey no title, and might be impeached

collaterally or in any other way. (*Eastman* v. *Salsbury*, 21 How., 426; *Stoddard* v. *Chambers*, 2 How., 284.)

The applicant for a Spanish grant presented to the governor a petition, or "requete," as it was called, accompanied by what was called a "figurative" or "conjectural" plan or map of the land desired. This map was not made from an actual survey, but served to indicate in a general way the location of the land sought to be acquired, so that the officials might know whether it was vacant or not and something of its prospective value. Without some such information the governor could not act advisedly in making or refusing the grant. In all cases there was an actual survey on the ground before the title of the Crown was divested, followed by an actual putting of the grantee in pedal possession. This delivery of possession under the Spanish law was a formal and indispensable requisite, and is thus described in *United States* v. *Davenport* (15 How., 5):

> The official went on the land in the presence of the grantee and of witnesses, and took the grantee by the right hand and walked with him a number of paces from north to south and the same from east to west, and then, letting go of his hand, the grantee walked about at pleasure on the said territory, pulling up weeds and making holes in the ground, planting posts, cutting down bushes, throwing clods of earth on the ground, and doing other things in token of the possession in which he had been placed, in the name of His Majesty, of said lands with the boundaries and extensions as prayed for.

This putting into possession under the Spanish law was analogous, if not equivalent, to the livery of seisin at common law, and both ceremonies appear to have been derived from the feudal law. The figurative plan or preliminary survey has sometimes been called a "chamber survey" (*Hunnicutt* v. *Peyton*, 102 U. S., 361), because it was made in an office or other place remote from the land indicated. (*Scull* v. *United States*, 98 U. S., 420.) The grant upon this chamber survey delivered out for actual survey did not mean the delivery of a perfect title, but of a mere incipient right, which authorized an actual survey and which required both an actual survey and a subsequent confirmation by the governor. (*United States* v. *Boisdore*, 11 How., 99.) Until an actual survey was made on the ground the grant or concession was only an inchoate right or a floating, unlocated claim. (*United States* v. *Hanson*, 16 Pet., 200.) To seek an analogy from the present laws, it was like a grant of land made by the Congress in aid of the construction of a railway. Such grants are usually made by words *in præsenti* upon the filing of the map of general location; and yet, while the grant is one *in præsenti*, it is a mere float, attaching to no specific particle of ground until the filing of the map of definite location and the acceptance and approval of such map in the Interior Department. (*United States* v. *Southern Pacific R. R. Co.*, 146 U. S., 570; *St. Paul, etc., R. R. Co.* v. *Phelps*, 137 U. S., 528.)

The actual survey which is required as a condition precedent to passing title to the grantee consisted of

running lines with the compass and chain, establishing corners, marking trees, and making field notes and plats of the work. These are the ingredients of an actual survey. (*Winter* v. *United States*, Hempst., 362 Fed. Cas., No. 17,985.) Until actual survey made, no specific particle of land was segregated from the public domain; and unless such a survey was made before the cession of Louisiana to the United States no title passed to Filhiol, his heirs or grantees. (*United States* v. *Lawton*, 5 How., 26.)

Not only is the want of legal title shown by the absence of allegations or documentary proof of actual survey, but the absence of such survey is affirmatively shown upon the face of the grant itself. The grant (Rec., p. 4) recites that the governor understands "that this land *is to be* measured so as to include the site or locality known by the name of Hot Springs, as is expressed by the figurative plan and certificate of the said surveyor," etc.; and thus, by the very terms of the grant itself, the existence of such actual survey is made a condition precedent to any investure of title. The governor approved the "figurative," "conjectural," or "chamber survey" of Trudeau, but he, as he was required to do under the law, stipulated that the land referred to should be measured and identified by an actual survey, which should leave nothing to conjecture. No such actual survey is pleaded or alleged in the petition, nor is any such actual survey produced or accounted for, nor is it alleged or shown that if any actual survey was made it was made in compliance

with the O'Reilly regulations, fixing the bounds thereof, both in front and depth, in the presence of the judge ordinary and two adjoining settlers present at the survey, and copies thereof made and returned to the persons named in the twelfth article of said O'Reilly regulations. For even if the land had been actually surveyed, as required by the regulations of Governor O'Reilly, still the claim would have had no validity unless a copy of the survey had been filed in the office of the scrivener of the governor, as therein provided. As was said by this court, in *Fremont* v. *United States* (17 How., 554), "the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed." And again, this court says:

> This concession was an incomplete grant and did not vest a perfect title to the property in the grantee according to the Spanish usages and regulations until a survey was made by the proper official authority and the party thus put in possession, together also with a compliance with other conditions if contained in the grant or in any general regulations respecting the disposition of the public domain. Possession with definite and fixed boundaries was essential to enable him to procure from the proper Spanish authority a complete title. (*United States* v. *Hughes*, 13 How., 2; *United States* v. *Hanson*, 16 Pet., 199.)

In the absence of such survey no right, either legal or equitable, vested in the plaintiffs' ancestor. The

original concession granted on his petition was a naked authority or permission, and nothing more. (*Fremont* v. *United States*, 17 How., 554; *Peralta* v. *United States*, 3 Wall, 440.) This survey could not "be done by conjecture. Lines and corners must be established by the finding so as to close the survey." (*Denise* v. *Ruggles*, 16 How., 243; *Hunnicutt* v. *Peyton*, 102 U. S., 539; *De la Croix* v. *Chamberlain*, 12 Wheat., 601; *Purvis* v. *Harmenson*, 4 La. Ann., 421.)

Such an inchoate claim as Filhiol possessed at the time of the cession was of no kind of validity as against the United States, and even if it had been expressly confirmed by act of Congress it would have derived its validity not from the Spanish grant but from the act of Congress alone. (*Dent* v. *Emmeger*, 14 Wall., 312.) The treaty between the United States and France of April 30, 1803, whereby the United States bound itself to protect the rights of the inhabitants of the province, has no application to a merely inchoate claim which was not binding on the Governments of either Spain or France, but which existed in entreaty. The treaty added nothing to the law of nations on the subject, and precisely the same rule has always been applied to inchoate entreaties made under the laws of the United States. (*Frisbie* v. *Whitney*, 9 Wall., 192; *Yosemite Valley case*, 15 Wall., 87; *Shipley* v. *Cowan*, 91 U. S., 330; *Hot Springs cases*, 92 U. S., 713.) The title of Filhiol, then, being incomplete at the time of the cession of the Territory of Louisiana to the United States, the treaty between France and the United

States imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law. (*United States* v. *Marinda*, 16 Pet., 153; *United States* v. *Hughes*, 13 How., 2.)

The necessity for requiring a strict scrutiny into claims of this sort and of requiring a due performance of all the requirements of the Spanish law has been often emphasized in litigation over these alleged Spanish grants. See *United States* v. *Samperyac* (Hempt., 118, 7 Pet., 222), in which it was shown that 117 decrees rendered in the superior court of the Territory of Arkansas were set aside on bills of review because such decrees had all been passed on forged grants. See also the case of *United States* v. *King* (3 How., 773), where a suit was brought on a Spanish grant that had been forged.

The certificate of the surveyor, Trudeau (Rec., pp. 4 and 5), does not supply this deficiency. This instrument reads as follows:

> I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita River, in the district of Arkansas, at about two leagues and a half distant from said river, *to be verified* by the figurative plan which accompanies, in conformity with ——— ——— of the 6th of the present month of December, in the current year 1788.

This is by no manner of means a certificate that the surveyor has actually measured this land in the manner provided in O'Reilly's regulations, to wit, by going upon the land itself and fixing the bounds thereof both in front and depth in the presence of the judge ordinary of the district and two adjoining settlers, who shall be present at the survey. The only certification here given is that Trudeau has *measured* the league of land on the *figurative or conjectural plan*, which accompanies the petition or memorial to the governor, and that such measurement upon the plan is subject to subsequent verification by actual survey on the land itself in the manner and form as required by the twelfth regulation of O'Reilly. Even, however, if this certificate had attempted or pretended to certify to an actual survey as required by O'Reilly's regulation, such statement could have no probative value whatever, for it is well settled that a recital in a grant that prerequisites have been complied with is not sufficient ground for a presumption that they have been observed. The only proof of this survey is the existence of one of the three copies of the plat required to be made, one of which was to be given to the governor, another to be registered in the office of the scrivener of the governor, and a third to be annexed by the grantee to his grant. (*Fuentes* v. *United States*, 22 How., 443.)

This court will take judicial notice of geography and history, and from such sources it is easily seen why Trudeau does not certify to any actual survey of

this land or to having put the grantee into actual possession thereof. In *Muse* v. *Arlington Hotel Company* (68 Fed. Rep., at p. 646), the reason is thus stated:

> The certificate of Trudeau refers to the petition or memorial upon which Filhiol's grant is based, and to an accompanying figurative plan. Neither of these is produced, nor is the loss of either shown, nor are the contents of either alleged. It is easy to account for the fact that Trudeau does not certify to any actual survey or any delivery of possession. In 1788 the nearest white settlements to the hot springs were insignificant and remote. The lands were occupied by Indians. To reach them would require a journey of many days, involving privation and terror. The lands had then no commercial value. Hence there was a total noncompliance with the regulations of O'Reilly.

It is therefore submitted that there is an utter failure in the declaration or exhibits of the plaintiffs to allege the legal title to the demanded premises in the plaintiffs' ancestor, or, as required by the Arkansas statute, to state such facts as shall show a *prima facie* title to the land in controversy. The judgment of the lower court, sustaining the demurrer and dismissing the plaintiffs' action, therefore, should, for this reason, be affirmed.

II.

Neither the alleged grant from Miro nor the alleged certificate of survey by Trudeau describes any land which is capable of identification or segregation from the public domain; nor are said descriptions sufficient to identify the land alleged to have been granted with the demanded premises.

It is well settled that where a deed, by reason of an imperfect description, is not effectual to convey the land, although it may be reformed in equity, it is not sufficient to sustain an action of ejectment. (*Prentice* v. *Stearns*, 113 U. S., 435; *Prentice* v. *Northern Pacific R. R. Co.*, 154 U. S., 163.)

The description of the land in the alleged grant from Miro (Rec., p. 4), is as follows:

> A tract of land 1 league square situated in the district of Arkansas on the north side of the river Ouchita, at about 2½ leagues distant from the said river Ouchita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters.

The description given in the alleged certificate of survey by Trudeau (Rec., p. 4), is as follows:

> I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouchita River, in the district of Arkansas, at about 2½ leagues distant from said river, to be verified by the figurative plan which accompanies, etc.

Neither the alleged grant nor the alleged certificate describes any land which is capable of identification. "A tract of land 1 league square" does not, as a term of description, suggest any boundary whatever. A tract of land described as being "about 2½ leagues distant from the river Ouchita" is indefinite to the point of vagueness. The exact distance from the river is not mentioned, nor is there anything to indicate at any point on the river to serve as a place of beginning. It is argued on behalf of the plaintiffs in error that the hot springs must be presumed to be the center of the tract, but no such presumption can be indulged in. (*Locompte* v. *United States*, 11 How., 125.) It is a rule of "universal application in the construction of grants, which is essential to their validity, that the things granted should be so described as to be capable of being distinguished from other things of the same kind, or to be capable of being ascertained by extraneous testimony." (*Buyck* v. *United States*, 15 Pet., 225.) In that case it was held by this court that "it is not possible to locate any land, as no part was granted;" and the court further added that "the public domain can not be granted by the courts." This rule has been frequently applied to other cases based on Spanish grants. (*Hunnicutt* v. *Peyton*, 102 U. S., 359; *United States* v. *Castellero*, 2 Black., 20.) In *Vilemont* v. *United States* (13 How., 267) the court said:

> Nor is it possible to make a decree fixing any one side line or any one place of beginning for a specified tract of land.

And again, in *Villabolos* v. *United States* (10 How., 556), the court said:

> In cases of a vague description this court has uniformly held that no particular land was severed from the public domain by the grant and that no survey could be ordered by the courts of justice.

In *Scull* v. *United States* (98 U. S., 413) a map was attached to the figurative survey. A surveyor testified that from the map he could survey the land and mark out its metes and bounds and claimed that he had made an accurate survey of the land claimed; but the court held that there was no valid grant. In *United States* v. *Boisdore* (11 How., 93) the claim was held to be void for the want of an actual survey. The court said that the identity of the land could not be fixed and that it could not be ascertained that any specific tract was severed from the public domain by the grant at the time that Spain ceded Louisiana, "and the claim can not be ripened into a complete title by our decree, as we have only power to adjudge what particular tract of land was granted. Our action is judicial. We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had and as Congress had." See also *United States* v. *Delespine* (15 Pet., 319).

Not only is it impossible to identify or distinguish any specific tract of land by the imperfect and unintelligible descriptions in the grant and alleged certificate, but it is also impossible to identify the land alleged to

have been granted with the land described in the petition as the demanded premises. The demanded premises are thus described in the petition (Rec., p. 8):

> A parcel of land situated in the city of Hot Springs, Garland County, Ark., the same being that on which the bath house "Independent" is situated, on the permanent reservation at Hot Springs, Ark., described as follows: "Bath-house site No. 8, on the plan formulated and filed in the Interior Department by the superintendent of the Hot Springs Reservation on the 12th day of May, 1891, numbered 1162, commencing 30 feet northerly from station 8, on said plan, on the front bath-house line, and thence northerly along said line 100 feet to a point 30 feet northerly of station 9 on said line, thence easterly 75 feet, thence southerly 100 feet, and thence westerly 78 feet to the place of beginning."

By what possible means can a court identify this parcel of land with any part of a parcel of land situate in the district of Arkansas, on the north side of the Ouachita River, and about 2½ leagues distant from said river? Even if the grant relied upon be conceded to be valid and as vesting in the plaintiffs' ancestors the legal title of the tract described, still there is nothing to show that the lands occupied by the defendants in error are a part of the same lands granted to the plaintiffs in error. This being true, the demurrer to the petition was properly sustained.

III.

The petition does not allege nor do the exhibits filed in support thereof show that the claimants or their ancestors in title ever had such actual possession of the demanded premises as is necessary to support an action of ejectment.

If the alleged possession of the premises be based upon the prior possession of the plaintiffs, the allegations are wholly insufficient.

As against a person rightfully in possession—in contradistinction to a mere trespasser or squatter—it is incumbent upon the plaintiff, in an action of ejectment, to allege and prove that he had actual possession of the demanded premises and that such possession continued without interruption down to the period of ouster by the defendant.

Prior possession alone will entitle the plaintiff to recover against a mere intruder, provided such possession was continuous, but the action to recover upon such prior possession must be brought within a reasonable time after its loss, and such prior possession will be deemed to have been abandoned by any unreasonable delay in bringing an action, unless satisfactorily explained. (*Sabariego* v. *Maverick*, 124 U. S., 261, 299, 300.) In *Sabariego* v. *Maverick* (*supra*), this court, speaking through Mr. Justice Matthews, said (at pp. 297–298):

> This rule is founded upon the presumption that every possession peacefully acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder.

But as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peacefully and in good faith under color of title. (*Lessee of Fowler* v. *Whitman*, 2 Ohio St., 270; *Drew* v. *Swift*, 46 N. Y., 204.) And in the language of the supreme court of Texas, in *Wilson* v. *Palmer* (18 Tex., 592, 595), the evidence must show a continuous possession, or at least that it was not abandoned, to entitle the plaintiff to recover merely by virtue of such possession. That is to say, the defendant's possession is, in the first instance, presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion of the defendant, whose possession, therefore, originated in trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost by the wrongful act of the defendant in dispossessing him. If the plaintiff can not show an actual possession and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show facts amounting to such constructive possession. If the lands when entered upon by the defendant were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession at some prior

time, he must go further and show that his actual possession was not abandoned; otherwise he can not be said to have had even a constructive possession.

Tested by these principles the allegations of the petition are utterly insufficient. It is not pretended or alleged that any actual possession of the land in question was ever had by the plaintiffs' ancestor until the year 1819, and then only by implication, in the following allegation (Rec., p. 5): "The plaintiffs further state that their said ancestor, the said Don Juan Filhiol, in the year 1819, leased the said hot springs to one Dr. Stephen P. Wilson, for five years, and that shortly after making the said lease to the said Wilson, to wit, in the year 1821, the said Filhiol died, as aforesaid, and since the death of their said ancestor the plaintiffs have always urged their title to said property, and employed agents and attorneys to do so for them," etc.

It is true that in a preceding paragraph the declaration alleges that, as a matter of law, the certificate of Trudeau was a delivery of the "judicial possession of said land" to their ancestor. But this is merely alleging an issue of law, and is wholly insufficient to support an allegation of actual possession. It will be observed, therefore, that the declaration admits that there was no actual occupancy of this land until the year 1819, and then only through a lessee, whose occupation, however, is not alleged, which occupancy ceased in 1821, and has never since existed in the plaintiffs. It is not alleged in the declaration that their occupancy ceased by reason of the unlawful

entry of the defendants in error in 1821, but, on the contrary, it is expressly alleged that the defendants in error did not enter upon the land until January, 1897. (Rec., p. 8.) It will be seen, therefore, that, according to the allegations of this petition, the demanded premises were either vacant or else in the possession of some person other than the plaintiffs in error from the year 1821 to the year 1897, when the entry of the defendants in error occurred. It is manifest, therefore, that when the entry of the defendants in error occurred the plaintiffs in error were not in possession of the land, and consequently could not have been unlawfully ousted from said possession by the defendants in error, and the allegation to that effect in this declaration is shown by the declaration itself to be false and impossible, since at the time of the entry of the defendants in error the plaintiffs in error had not been in possession of the demanded premises for more than seventy-eight years.

IV.

The declaration does not allege, nor do the exhibits filed in support thereof show any right of possession to the demanded premises in the plaintiffs in error.

It is thoroughly well settled that the action of ejectment is a possessory action, and that in order to entitle the plaintiff to recover he must have the right of possession. The action involves both the right of possession and the right of property, and if the facts developed show that the plaintiff is not in equity and

conscience entitled to disturb the possession of the defendants, the action must fail. (*Cincinnati* v. *White*, 6 Pet., 431; *Love* v. *Simms*, 9 Wheat., 515; *Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68, 75, 78.)

But inasmuch as this doctrine is founded upon equitable estoppel, or estoppel *in pais*, which will be fully treated in Division VI of this brief, its further consideration will not be indulged in here.

V.

The decisions of this court, and of other courts of the United States, of which this court will take judicial notice, establish the fact that the legal title, as well as the ownership and possession, of the demanded premises was, until August 24, 1818, outstanding in the Quapaw Indians, and that since said time the title, ownership, and possession of the demanded premises has been outstanding in the United States of America by treaty of purchase with said Indians, and has never been sold or otherwise disposed of.

It is well settled that the defendants in an action of ejectment may show a paramount outstanding and subsisting title in a stranger and thereby defeat the action of the plaintiff. (*Doswell* v. *De la Lanzo*, 20 How., 29; *Smith* v. *McCann*, 24 How., 398; *Love* v. *Simms*, 9 Wheat., 515; *Greenleaf* v. *Birth*, 6 Pet., 302; *Marsh* v. *Brooks*, 8 How., 223.) In *Doswell* v. *De la Lanzo* (*supra*) this court said:

> In an action of ejectment the defendant may show a paramount outstanding and subsisting title for the same land in a stranger, to defeat the plaintiff.

In *Smith* v. *McCann* (*supra*) this court said:

> In an action of ejectment the lessor of the plaintiff must show a legal title in himself to the land he claims and the right of possession under it at the time of the demise laid in the declaration and at the time of the trial. He can not support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery; nor is the defendant required to show any title in himself; and if the plaintiff makes out a *prima facie* legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

The Spanish laws prevailing at the time of this alleged grant with regard to the Indian tribes were far more humane than any laws that have ever existed in this country. (5 Am. St. Papers, pp. 226, 232, 234.) Yet it has always been held that the Indian right of occupancy in the United States was sacred until extinguished by cession to the Federal Government. (*United States* v. *Cook*, 19 Wall., 591; *R. R. Co.* v. *United States*, 92 U. S, 742; *Cherokee Nation* v. *Georgia*, 5 Pet., 1.) So all Spanish grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it. (*Chouteau* v. *Molony*, 16 How., 239.) Hence it is easy to account for the fact that in this case there was no survey and no delivery of possession. The Indian title to the land in controversy was not extinguished until

August 24, 1818. (*Hot Springs cases*, 92 U. S., 698.) At that time the pretended title of Filhiol had long since lapsed, because it was not possible to perfect it after the cession of the territory of Louisiana to the United States, by the treaty between the United States and France, ratified in 1803. The grant relied upon imposed upon the United States no obligation to make a title to lands of which the grantee had neither actual seisin nor seisin in law at the date of that treaty. (*United States* v. *Miranda*, 16 Pet., 153.)

In the year 1875 this court held (*Hot Spring cases*, 92 U. S., 698) that the third section of an act of Congress, approved April 20, 1832 (4 Stats., 505), which is still in force, enacts that 4 sections of land, including the Hot Springs in Arkansas, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatsoever; that the Indian title to said lands was not extinguished until August 24, 1818, nor were the public surveys extended over them until 1838, nor has any sale of them ever been authorized by law; that no part of said lands was ever subject to preemption or to location, and that no claim thereto has ever been validated or confirmed by any act of Congress.

Manifestly, therefore, the title, possession, and right of possession of the demanded premises was outstanding in the Indians until the year 1818, and since that time has been and still is outstanding in the United States of America. These facts and laws, having been determined by prior decisions of this court, of which this court will take judicial notice, having been brought

to the attention of the court, it is manifest that the declaration at bar does not and can not state a cause of action, and the demurrer thereto was properly sustained.

VI.

The plaintiffs are estopped from bringing this action by the facts surrounding the transaction as established by the decisions of this court and by the public laws and records of the United States, of which courts will take cognizance upon a demurrer, and which need not be specially pleaded or proved.

It is thoroughly well settled that the action of ejectment is a possessory action and that the plaintiff, to entitle him to recover, must allege and prove the right of possession. (*Cincinnati* v. *White*, 6 Pet., 431; *Love* v. *Simms*, 9 Wheat., 515; *Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68; *Sabariego* v. *Maverick*, 124 U. S., 261, 298, 299, 300.)

In an action of ejectment a defense of equitable estoppel may be sufficient. An action of ejectment involves both the right of possession and the right of property; and where the facts developed show that the plaintiff is not in equity and conscience entitled to disturb the possession of the defendant, the latter may rely upon the doctrine of equitable estoppel to protect his possession. (*Dickerson* v. *Colgrove*, 100 U. S., 578; *Kirk* v. *Hamilton*, 102 U. S., 68, 76–79.)

In *Kirk* v. *Hamilton* (*supra*) this court, speaking through Mr. Justice Harlan, said:

> We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title

to land can not be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is true as between us, if he has been misled by my asservation," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent, in *Wendell* v. *Van Rensselaer*, 1 Johns. Ch., 344: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowngly, although he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law. In *King* v. *The Inhabitants of Butterton* (6 Durnf. & E., 554) Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." In 2 Smith Lead. Cas., pp. 730–740 (7 Am. ed., with notes by Hare & Wallace) the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law. Again (pp. 733, 734): "The question presented in these and other cases which involve the

operation of equitable estoppels on real estate is both difficult and important. It is undoubtedly true that the title to land can not be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the statute of frauds which require a writing when realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was deemed to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would therefore seem too late to contend that the title to real estate can not be passed by matter *in pais* without disregarding the statute of frauds; and the only room for dispute is as to the form in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims

of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name implies, chiefly, if not wholly, derived from courts of equity, and as those courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decision."

This question, in a different form, was examined in *Dickerson* v. *Colgrove* (100 U. S., 578). That was an action of ejectment, and the defense, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that, as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no rea-

son why the latter might not under the circumstances disclosed rely upon the doctrine of equitable estoppel to protect his possession.

In view of these settled principles, let us examine the history of this claim as disclosed by the decisions of this court and the public laws of the United States The following facts are taken from the decision of this court in the *Hot Springs cases* (92 U. S., 698, at pp. 699, 714, 715).

The title to the well-known watering place in the State of Arkansas, called the "Hot Springs," has been contested by a number of claimants for nearly half a century. The springs are situated in a narrow valley or ravine, between two rocky ridges, in one of the lateral ranges of the Ozark Mountains, about 60 miles to the westward of Little Rock. Although not easily accessible, and in a district of country claimed by the Indians until after the treaty made with the Quapaws, in 1818, they were considerably frequented by invalids and others as early as 1810 or 1812; but no permanent settlement was made at the place until a number of years afterwards. Temporary cabins were erected by visitors and those who resorted there to dispose of articles needed by visitors, but were only occupied during a portion of the year. The public surveys were not extended to that portion of the country until 1838 (p. 699).

It is well known that the territory purchased of the French Government in 1803 was, on the following session of Congress, divided into two Territories, one

called the Territory of Orleans, comprising west Florida and the present State of Louisiana, and the other called the district of Louisiana and comprising the whole region west of the Mississippi and north of that State. The land titles, which had been perfected and located by surveys, offered no difficulties; but there were many inchoate titles, which had never been perfected, and which, by the laws of France and Spain, the claimants had a right to perfect. In order that the Government of the United States might know what claims it was bound in good faith to respect, measures were taken to have all outstanding claims brought in and recorded and located by surveys, where these should be necessary. By the act of March 2, 1805 (2 Stats., 324), the Territory of Orleans was divided into two land districts, for each of which a register was appointed; but for the district of Louisiana an officer was created, called the recorder of land titles, who continued for many years to exercise important functions in regard to the public lands in the district, even after the appointment of a surveyor and of registers and receivers under the general land laws. The act referred to required every person claiming lands, *whether by complete or incomplete title*, within a limited time to deliver to the registers of Orleans, or to the recorder of land titles in the district of Louisiana, a notice of his claim with a plat of the tract of land claimed, and also his grant, order of survey, or other written evidence of his claim, which documents the said registers and recorders, respectively, were to record in proper books. Claims not so presented and recorded within

the proper time were to be barred as against grants from the United States. The act further provided for the appointment of two additional persons in each district to act with the register or recorder as a board of commissioners to examine and decide upon the claims which should be presented, whose duty it was, after deciding, to report their decision to Congress and to deposit the same with all the evidences and documents in the offices of the register and recorder, respectively, within whose district the lands lay. The report of these commissioners and the acts of Congress confirmatory thereof formed the basis of the title derived from the French and Spanish authorities. And this constitution of the office and duty of the recorder of land titles in the district of Louisiana led to the importance subsequently attached to the return and registration of other surveys in the same office. It was there that the officers of the Government looked, or were supposed to look, for all authenticated claims to lands in the district. No lands were supposed to be appropriated or segregated from the public domain unless recorded or registered there.

There is no allegation in the petition and no pretense that the ancestor of the plaintiffs ever complied with the provisions of this act, and not having complied therewith the claim is, as was expressly adjudicated by this court in the Hot Springs cases, of no validity whatever. (See pp. 714, 715, 716.)

The next act of Congress by which the United States endeavored to set at rest the claims to the land in the Hot Springs Reservation was the act of May 26,

1824 (4 Stats., 52), entitled "An act enabling claimants to lands within the limits of the State of Missouri and the Territory of Arkansas to institute proceedings to try the validity of their claims." It provided for the adjustment of all claims arising out of Spanish and French grants by petitions to be filed by the claimants in the district courts of the United States. The fifth section of this act is as follows:

> *And be it further enacted*, That any claim to lands, tenements, or hereditaments within the purview of this act, which shall not be brought by petition before said courts within two years from the passing of this act, or which, after having been brought before said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred both at law and in equity, and no other action at law or proceeding in equity shall ever thereafter be sustained in any court whatever in relation to said claims.

It is not alleged in the petition that the claimants or their ancestor in title ever complied with the provisions of this act.

The third act of Congress by which it was attempted to settle the disputes concerning the Hot Springs Reservation was the act of May 3, 1870 (16 Stats., 149), wherein it was provided that—

> Any person claiming title, either legal or equitable, to the whole or any part of the four sections of land constituting what is known as the Hot Springs Reservation, in Hot Springs

> County, in the State of Arkansas, may institute against the United States in the Court of Claims and prosecute to final decision any suit that may be necessary to settle the same: *Provided*, That no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall not be brought under the provisions of this act within that time shall be forever barred.

Under the provisions of this act numerous suits were brought in the Court of Claims for the recovery of the various parcels of land within the Hot Springs Reservation, but were all dismissed by said court for the reason that the claims had no foundation either in law or equity, and upon appeal the decree of the Court of Claims was confirmed by this court and all of the cases were dismissed. (*Hot Springs cases*, 92 U. S., 698.)

It is not alleged in the petition that the claimants or their ancestor in title ever complied with the provisions of this act of Congress, or ever instituted the suit therein required to be brought in the Court of Claims. But it does appear from the published decisions of the Court of Claims that in the year 1893 Roland M. Filhiol, administrator of Don Juan Filhiol, and one of his heirs at law, did institute a suit in the United States Court of Claims for the recovery of rent of the land here sought to be recovered, and that the same was dismissed by that court because said suit was barred under the provisions of the first section of the Hot Springs act of 1870, quoted *supra*. (See *Filhiol, administrator*, v. *United States*, 28 C. Cls. R., 110.)

It is contended on behalf of the plaintiffs in error that the periods of limitation provided in the above-recited acts can not apply as a bar to the present action for the reason that said periods of limitation were only applicable to suits against the United States, and that the present action is not against the United States, but against individuals in possession of the demanded premises, and that although they hold under lease from the United States, yet an action against them is not an action against the United States so as to deprive the courts of jurisdiction over a suit against the sovereign. This contention is made upon the authority of *United States* v. *Lee* (106 U. S., 196) and *Tindal* v. *Westly* (167 U. S., 204). It is not necessary to so contend, and such is not here our purpose in invoking the statutes above referred to. The purpose is not to suggest to the court that this is a suit against the United States which can not be maintained for the reason that the Government has not given its consent to such a suit, or to contend that the periods of limitation mentioned in the above-recited acts are to be applied to this action as the statute of limitations is applied to an ordinary action at law. Our purpose is to show that the proprietor of the demanded premises, in whom is outstanding the legal title and the actual possession thereof, has ever since 1805 given to every adverse claimant ample opportunity to establish his rights to the demanded premises, first, by the provision concerning the recording of the title; second, by authorizing a suit to be

brought in the Arkansas courts, and, third, by authorizing suits to be brought in the United States Court of Claims; and that notwithstanding such ample opportunity to establish their claim to the demanded premises the claimants have utterly failed to establish or to attempt to establish the same, but on the contrary have slept upon their rights without embracing the opportunities thus given to them for nearly one hundred years. This being so, the principle of equitable estoppel announced at the opening of this division of the brief runs against the plaintiffs with full force and effect.

Not only is the culpable silence and neglect of the claimants shown by their failure to embrace the opportunities given to them by the above-recited acts to establish their title, but it is further shown by notorious facts of history and geography, of which this court will take judicial cognizance. These facts can not be better stated than by an excerpt from the decision of the circuit court for the eastern district of Arkansas in the case of *Muse* v. *Arlington Hotel Company* (68 Fed. Rep., pp. 650, 651):

> As shown by the facts alleged in the complaint, Juan Filhiol never paid anything for the land sued for. He never paid even the trivial fee necessary to be paid in order to have his grant registered. He never complied with the requirements of the grant or with the requirements of the laws in force at the time that, as alleged, the lands were donated to him. The taxes that have accrued on the property covered by the

grant during so many years, with accrued interest, must amount to a very large sum, of which it is extremely improbable that the plaintiffs have paid anything. In 1788 the Hot Springs were upon lands occupied and owned by a tribe of Indians and were far from any European settlement. They were in the midst of an unbroken wilderness, and they could be reached from such places as New Orleans or St. Louis only after many days of arduous travel through a country where there were only rude Indian trails instead of roads. Such a journey would have been attended by perils and by every kind of discomfort. It could only be made by men in robust health and in the full vigor of life. Before the application of steam to navigation our water courses would have impeded rather than assisted the traveler. The country had but few inhabitants. New Orleans was only a small town and St. Louis was an obscure village on the extreme margin of the vast and unexplored wilderness stretching from the Mississippi to the Pacific. Only De Soto, in 1541, and a few later explorers of the white race, had ever seen the springs. Their medicinal qualities a hundred and six years ago were unknown, but having been ascertained after the cession, in 1818, the United States Government bought up the title of the Indians. In 1832, recognizing the great importance of the springs to the general public, it reserved the property from entry and sale; and for their use it now holds it in trust, if not in deed, for the heirs of Filhiol. In the meantime, before the commencement of this suit, a thriving and prosperous city had been

built up around the springs. The Federal Government had spent large sums for hospitals and in improving and beautifying its property. By the joint labor and money of private citizens, the municipality, and the Federal Government, streets had been laid out, parks had been established, churches and schoolhouses had been erected, and railway connections with the rest of the continent had been created. In hotels all provision had been made for guests and for the traveling public, at the expense of millions of dollars. Many of the citizens and others have made these investments largely because they supposed that the springs themselves would be perpetually under the control of the Federal Government and would be managed with its usual fairness and generosity. If they should be decreed to be private property the event would simply be a public and private calamity of incalculable magnitude. They would become an unending monopoly; their control the subject-matter for greed, avarice, selfishness, extortion, and all the whims and caprices of private individuals under no responsibility to the public; owners who might, if they thought fit, wholly exclude others from the healing waters, or impose such conditions upon access to them as would be intolerable. The plaintiffs, however, after so long a delay, during which time they have never spent a cent in the great work of making these many enduring and costly improvements, are now asking that they may reap what they have not sown. But it has often been held that if one

sees another making costly improvements on his lands, believing them to be his own, without any assertion of title, he will be estopped from claiming an adverse title. (*Erwin* v. *Lowry*, 7 How., 172; *Kirk* v. *Hamilton*, 102 U. S., 68; *Close* v. *Glenwood Cemetery*, 107 U. S., 466; *Jowers* v. *Phelps*, 33 Ark., 465.) No stronger case than the present, as coming within this principle, is likely to occur.

It is submitted therefore that from every possible point of view the plaintiffs have wholly failed to state a cause of action; that the demurrer of the defendants in error was properly sustained and the action properly dismissed by the court below, and that the judgment of the court below should be affirmed.

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Assistant Attorney-General.

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Supreme Court of the United States.

No. 50.—October Term, 1901.

Hippolite Filhiol et al., Plaintiffs in Error, vs. Charles E. Maurice, Charles G. Convers, and William G. Maurice.	In error to the Circuit Court of the United States for the Eastern District of Arkansas.

[April 7, 1902.]

This was an action of ejectment brought by Hippolite Filhiol and others, in the Circuit Court of the United States for the Eastern District of Arkansas, against Charles E. Maurice, Charles G. Convers and William G. Maurice, for the recovery of a parcel of land in the city of Hot Springs, Garland County, Arkansas, on the permanent reservation at Hot Springs, described as Bath house site No. 8, and for rent thereof as damages. Plaintiffs deraigned title as heirs at law of Don Juan Filhiol, to whom it was alleged the lands were granted February 22, 1788, by the then Spanish governor of the province of Louisiana, by virtue of which grant said Filhiol became the owner of a tract of "about three miles square, embracing all the hot springs in the city of Hot Springs, Garland County, Arkansas," and including the parcel of land for which plaintiffs brought suit. The complaint did not aver the citizenship of plaintiffs or defendants, although the caption described plaintiffs as residents of several States other than Arkansas, but it was averred as follows: "And for cause of action say that by the Fifth Amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty and without due process of law and in violation of the Fifth Amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the second day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession and they now hold possession of the land in controversy wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs." Defendants demurred to the complaint, on the ground that its allegations did not "constitute a cause of action."

The Circuit Court sustained the demurrer, and plaintiffs electing to stand on their complaint and declining to amend, the complaint was dismissed with costs. A writ of errror directly from this court was then allowed.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Writs of error may be sued out directly from this court to the Circuit Courts in cases in which the construction or application of the Constitution of the United States is involved; or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891, c. 517, § 5, 26 Stat. 826.

And we repeat, as has often been said before, that a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of the validity or construction in disposing of the right asserted. *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, and cases cited.

The jurisdiction of the Circuit Court was not invoked in this case on the ground of diverse citizenship, but on the ground that the case arose "under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." And it is settled that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim.

As the Circuit Court took jurisdiction, which could only have been on the latter ground, and decided the case upon the merits, the writ of error was properly taken directly to this court, the jurisdiction of which is exclusive in such cases. *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. p.——; *American Sugar Company* v. *New Orleans*, 181 U. S. 277.

We are met, however, on the threshold with the question whether the jurisdiction of the Circuit Court could be maintained on that ground. It does not appear that this question was raised below, and, on the contrary, the Circuit Court disposed of the case on the merits, that is, assuming jurisdiction, the Circuit Court decided that the complaint failed to set up a cause of action.

Did it appear from plaintiffs' own statement that the case arose under the Constitution or a treaty of the United States? We do not think it did.

The Fifth Amendment prohibits the exercise of Federal power to deprive any person of property without due process of law, or to take private property for public use without just compensation; and the treaty of October 21, 1803, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. Public Treaties, 200.

But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specifically, or through averments that plaintiffs were ousted in violation of the treaty and of the Fifth Amendment, the provisions of which it was the duty of the Federal Government to observe.

The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought, but it was not made to appear that the Circuit Court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued, and so far as defendants were concerned, it was not charged that they took possession by direction of the government, and plaintiffs set up no more than a wrongful ouster by merely private persons, remediable in the ordinary course, and in the proper tribunals. And see *Arkansas* v. *Coal Company*, 183 U. S. 185; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430.

The particular grounds of the decision of the Circuit Court on the merits do not appear, nor is it material, as that court manifestly had no jurisdiction.

Judgment reversed and cause remanded with a direction to dismiss the complaint for want of jurisdiction with costs.

True copy.

Test:

Clerk Supreme Court, U. S.